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# **Representation in Family Court Proceedings**

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**Friday, June 9, 2017**

**New York State Bar Association  
Albany, NY**

## ***CLE Course Materials and NotePad<sup>®</sup>***

*Complete course materials distributed in electronic format online in  
advance of the program.*

**Sponsored by the**

**New York State Bar Association Committee on Mandated Representation**

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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](http://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.

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## 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!

**Susan Klemme, LAP Director**

**1.800.255.0569**

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# 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.**

**Representation in Family Court Proceedings, Friday, June 9, 2017 | New York State Bar Association's Committee on Mandated Representation, New York State Bar Association, 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.





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

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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	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Organization	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Administration	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Meeting Site (if applicable)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Additional comments

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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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**Committee on Mandated Representation  
CLE Program & Awards Luncheon  
Friday, June 9<sup>th</sup>  
State Bar Center, Albany, NY**

**Representation in Family Court Proceedings**

**Description:** Leading practitioners knowledgeable about representation in Family Court proceedings will provide an overview of best practices and offer practical advice and strategies. The day-long CLE will cover the outer boundaries of Article 10, best practices for representing third parties and relatives, provide an overview of defending and prosecuting cases involving domestic violence, and cover the UIFSA, UCCJEA, ICWA and the Hague Convention. The CLE will feature a panel of experienced practitioners who will discuss special considerations in Family Court proceedings and offer practical suggestions and strategies for how to best represent your clients. 6.5 MCLE Credits

**Speakers:**

Amanda McHenry, Esq., Assistant Supervising Attorney, Family Court Program,  
Hiscock Legal Aid Society

Gary Solomon, Esq., Legal Aid Society Juvenile Rights Practice

Hon. Deborah Kaplan, Statewide Coordinating Judge for Family Violence Cases, NYS Unified Court System

Audrey E. Stone, Chief Counsel to the Office of the Statewide Coordinating Judge for Family Violence  
Cases, NYS Unified Court System

Marguerite A Smith, Esq.

Thomas Gordon, Family Court Support Magistrate

Jeremy Morley, Esq.

Adele Fine, Esq., Monroe County Public Defender

Nancy Farrell, Esq., Supervising Attorney, Family Court Program, Hiscock Legal Aid Society

Janet Fink, Esq., NYS Unified Court System

Linda Gehron, Esq., Hiscock Legal Aid Society

**Agenda**

9:30-10:00: Registration

10:00-10:05: Welcome (Andy Kossover)

10:05-10:55: Outer boundaries of Article 10 (1 CLE)

Panelists: Amanda McHenry & Nancy Farrell

10:55-12:20: Case Update on Third Parties and Relatives (1.5 CLE)

Presenter: Gary Solomon

Moderator: Jan Fink

12:20-1:05: Lunch + awards

1:05-2:20: Domestic Violence Cases: Prosecuting + Defending (1.5 CLE)

Panelists: Hon. Deborah Kaplan, Audrey Stone & Linda Gehron

2:20-2:35: Break

2:35-3:50: Crossing Borders (UIFSA, UCCJEA, Hague, ICWA) (1.5 CLE)

Panelists:

Marguerite A. Smith (Indian Child Welfare Act)

Thomas Gordon (UIFSA)

Jeremy Morely (UCCJEA & Hague Convention)

Moderator: Jan Fink

3:50-4:40: Ethics: client competency re decisions, notice of rights, etc. (1 ETHICS CLE)

Panelists: Adele Fine

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**Representation in Family Court Proceedings**

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**Topic One**

**Outer Boundaries of Article 10**



## THE OUTER BOUNDARIES OF ARTICLE 10

“Do these allegations actually amount to a finding of neglect, even if proven true?”

### Pre-Petition areas of inquiry

- Indicated Reports
- Expungement Hearings

### **Areas to pay extra attention to:**

#### Domestic Violence

- *Nicholson v. Scoppetta, 3 N.Y.3d 357 (2004)*
- FCA §1012 (h)
- Were the children present?
- Were the children at actual imminent risk of being harmed?
- Were they harmed or affected at all?
- Did the client seek assistance from a shelter?
- The ages of the children who are the subject of a neglect petition revolving around domestic violence

#### Educational

- FCA §1012 (A)
- Educational Law, Article 65, Part 1
- No means of transportation
- How old is the child?
- Was the child actually getting to school and leaving?
- Are they failing or getting poor grades?
- Has the client exhausted all avenues of getting a child to school?
- Was the child being bullied at school, maybe even harmed at school?

#### “Dirty House”

- FCA §1012 (A)
- *Matter of Erik M., 804 N.Y.S.2d 884 (November 2005)*
- Which areas of the home were not habitable
- Running water? Electricity?
- Appropriate place to sleep, eat and use the restroom?
- Remember, the standards are minimal, not neglect if the home is just “undesirable”
- Could the client afford a home without the issues it presents with?
- Have they called their landlord and sought help?

#### Failure to protect

- FCA §1012 (e)(i)
- FCA §1012 (f)(i)
- Was it even reasonable for your client to be expected to protect the child?

- Did they **not** know what was occurring, and for good reason?
- Did they take all appropriate action once they found out?

Was the client financially able to prevent the neglect from occurring or could it be reasonably concluded they could prevent the neglect from occurring?

- FCA §1012 (A)
- Being poor does NOT equal being a neglectful parent
- Did the client not have reasonable access to services or assistance
- Were reasonable efforts made?

Derivative Neglect

- *Matter of Karm'ny QQ (Steven QQ.), 114 A.D.3d 1101. (3<sup>rd</sup> Dept., 2014)*
- *In re Jocelyne J., 8 A.D.3d, 978 (4<sup>th</sup> Dept., 2014)*
- *In Re Daniella HH, 236 A.D.2d 715 (3<sup>rd</sup> Dept., 1997)*
- *Matter of Dana T. v. Anna D., 71 A.D.3d 1376, 1377 (4<sup>th</sup> Dept. 2010)*
- *In the Matter of Madison J.S., 136 a.d.3D 1404 (February 11, 2016)*
- How long ago was the prior finding
- Was there a “target” child if the derivative is being sought for other children in the home?
- Any impact on the other children?
- Has the client ameliorated all issues that lead to the prior finding?

Mental Health

- Is the client actively engaged in treatment
- Are they on medications
- Does their diagnosis actually interfere with their ability to parent

Substance Abuse

- FCA §1046 (iii)
- Is the use around the children ever
- Has the client been actively engaged in treatment
- Are they in treatment voluntarily and are they regularly participating

Troubled Youth

- Should this be an “L” docket/ Voluntary
- What could the client have done differently if anything and was that reasonable
- JD/PINS
- How has CPS/ACS dealt with the child, what type of home or care are they in with them

What amounts to an actual finding of Abuse and defenses

- FCA §1012 (j)
- Res Ipsa
- Severe/Repeated Abuse
- Prosecuting the parent who was responsible

- Can you rebut the presumption of parental culpability

#### Discovery

- CPLR §3041
- CPLR §3120
- CPLR §3031
- Bill of particulars
- Demand for Discovery
- Interrogatories

#### Motion Practice

- CPLR §3211
- CPLR §3124
- Motion to Dismiss
- Motion to preclude

#### Alternate Solutions

- V-docket
- ACD
- Suspended Judgment
- Consent vs. Admission
- Dispositional Orders with “goal dates”

#### Termination of Parental Rights

- Different Standard of Proof
- Surrenders with visitation and/or contact
- The language of the surrender
- Adoption Registry



**AUTHORIZATION FOR RELEASE OF HEALTH INFORMATION PURSUANT TO HIPAA**

[This form has been approved by the New York State Department of Health]

Patient Name	Date of Birth	Social Security Number
Patient Address		

I, or my authorized representative, request that health information regarding my care and treatment be released as set forth on this form:

In accordance with New York State Law and the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), I understand that:

1. This authorization may include disclosure of information relating to **ALCOHOL** and **DRUG ABUSE, MENTAL HEALTH TREATMENT**, except psychotherapy notes, and **CONFIDENTIAL HIV\* RELATED INFORMATION** only if I place my initials on the appropriate line in Item 9(a). In the event the health information described below includes any of these types of information, and I initial the line on the box in Item 9(a), I specifically authorize release of such information to the person(s) indicated in Item 8.
2. If I am authorizing the release of HIV-related, alcohol or drug treatment, or mental health treatment information, the recipient is prohibited from redisclosing such information without my authorization unless permitted to do so under federal or state law. I understand that I have the right to request a list of people who may receive or use my HIV-related information without authorization. If I experience discrimination because of the release or disclosure of HIV-related information, I may contact the New York State Division of Human Rights at (212) 480-2493 or the New York City Commission of Human Rights at (212) 306-7450. These agencies are responsible for protecting my rights.
3. I have the right to revoke this authorization at any time by writing to the health care provider listed below. I understand that I may revoke this authorization except to the extent that action has already been taken based on this authorization.
4. I understand that signing this authorization is voluntary. My treatment, payment, enrollment in a health plan, or eligibility for benefits will not be conditioned upon my authorization of this disclosure.
5. Information disclosed under this authorization might be redisclosed by the recipient (except as noted above in Item 2), and this redisclosure may no longer be protected by federal or state law.
6. **THIS AUTHORIZATION DOES NOT AUTHORIZE YOU TO DISCUSS MY HEALTH INFORMATION OR MEDICAL CARE WITH ANYONE OTHER THAN THE ATTORNEY OR GOVERNMENTAL AGENCY SPECIFIED IN ITEM 9 (b).**

7. Name and address of health provider or entity to release this information:

8. Name and address of person(s) or category of person to whom this information will be sent:

9(a). Specific information to be released:

Medical Record from (insert date) \_\_\_\_\_ to (insert date) \_\_\_\_\_

Entire Medical Record, including patient histories, office notes (except psychotherapy notes), test result, radiology studies, films, referrals, consults, billing records, insurance records, and records sent to you by other health care providers.

Other: \_\_\_\_\_ Include: *(Indicate by Initialing)*

\_\_\_\_\_ **Alcohol/Drug Treatment**

\_\_\_\_\_ **Mental Health Information**

\_\_\_\_\_ **HIV-Related Information**

**Authorization to Discuss Health Information**

(b)  By initialing here \_\_\_\_\_ I authorize \_\_\_\_\_

Initials Name of individual health care provider

to discuss my health information with my attorney, or a governmental agency, listed here:

\_\_\_\_\_

(Attorney/Firm Name or Governmental Agency Name)

10. Reason for release of information: <input type="checkbox"/> At request of individual <input type="checkbox"/> Other:	11. Date or event on which this authorization will expire:
12. If not the patient, name of person signing form:	13. Authority to sign on behalf of patient:

All items on this form have been completed and my questions about this form have been answered. In addition, I have been provided a copy of the form.

Signature of patient or representative authorized by law. \_\_\_\_\_ Date: \_\_\_\_\_

\* **Human Immunodeficiency Virus that causes AIDS. The New York State Public Health Law protects information which reasonably could identify someone as having HIV symptoms or infection and information regarding a person's contacts.**

FAMILY COURT OF THE STATE OF NEW YORK  
COUNTY OF ONONDAGA

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In the Matter of the Commitment of the  
Guardianship and Custody pursuant to  
§ 384-b of the Social Services Law

Child's Name,

A Child under the Age of Eighteen Years  
Alleged to be Permanently Neglected by

Client's name,

Respondent.

---

**File #:**  
**Docket No.:**

**DEMAND FOR A VERIFIED  
BILL OF PARTICULARS**

**To: Onondaga County Department of Social Services /Children and Family Services  
C/O Onondaga County Department of Law  
Deputy County Attorney Name  
Deputy County Attorney  
John H. Mulroy Civic Center  
Onondaga County Law Department  
421 Montgomery Street, 10<sup>th</sup> Floor  
Syracuse, NY 13202**

**IT IS HEREBY DEMANDED** that you provide a Verified Bill of Particulars in response to the questions that are set forth below, providing that response to <insert attorney's office name>, as attorney for the Respondent, within twenty (20) days of receipt of this demand.

**UPON YOUR FAILURE** to provide a Verified Bill of Particulars in response to the questions set forth below, the Respondent will reserve the right to make a motion before the Family Court asking for relief pursuant to Civil Practice Law and Rules § 3126 which may include a request that the Petition before the Court be dismissed, or in the alternative that all issues that are the subject of this Demand for a Verified Bill of Particulars be deemed resolved in favor of the Respondent father, and further ask that the Court grant such other and further relief as it may deem just and proper.

Question No. 1: With respect to the allegation set forth at section 9(a) of the Petition, indicate the following:

1. Indicate those date, or dates that the Petitioner alleges that the Petitioner “developed a plan for appropriate services”.
2. Indicate whether the Respondent was present on those dates.
3. Indicate how the plan was communicated to the Respondent.
4. Provide the specific date or dates the plan was communicated to the Respondent.
5. Provide any and all details of the plan developed.
6. Indicate the name and location of any referrals made to the Respondent for services and how and when the Respondent was notified of these referrals.
7. If said communication by the Petitioner and the Respondent, for any of the provided responses above, was made in writing, provide a copy of the writing.

Question No. 2: With respect to the allegation set forth at section 9(c) of the Petition, indicate the following:

1. Indicate the date, or dates (and whether made verbally, or in writing) the Petitioner “reviewed and discussed said service plan” with the Respondent.
2. Provide the nature of those discussions.
3. If said communication by the Petitioner and the Respondent, for any of the provided responses above, was made in writing, provide a copy of the writing.

Question No. 3: With respect to the allegation set forth at section 9(d) of the Petition, indicate the following:

1. Indicate the date, or dates (and whether made verbally, or in writing) the Petitioner reviewed the progress of the Respondent to determine whether referrals to service providers were appropriate.
2. Provide the full name, title, and educational and employment background of the individual/s who reviewed and made determinations with regards to the appropriateness of the referrals.
3. Provide the determination of each of those reviews.
4. Indicate whether those determinations were communicated to the Respondent and if they were on which date or dates.
5. If said communication by the Petitioner and the Respondent, for any of the provided responses above, was made in writing, provide a copy of the writing.

Question No. 4: With respect to the allegation set forth at section 9(c) of the Petition, indicate the following:

1. Indicate the date, or dates (and whether made verbally, or in writing) the Petitioner “reviewed and discuss~~ed~~ said service plan” with the Respondent.

2. Provide the nature of those discussions.
3. If said communication by the Petitioner and the Respondent, for any of the provided responses above, was made in writing, provide a copy of the writing.

Dated:

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Attorney for Respondent's Name  
Address  
Phone number

TO: Deputy County Attorney  
*Address*  
*Email*

cc: Attorney for the Child  
*Address*  
*Email*

STATE OF NEW YORK  
ONONDAGA COUNTY FAMILY COURT

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In the matter of

**Child A (DOB)**  
**Child B (DOB)**

Family File #:  
Docket #: NN-

Children under the age of Eighteen Years of Age  
Alleged to be Neglected by

**NOTICE OF MOTION  
TO DISMISS**

**Jane Doe**

Respondent.

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**PLEASE TAKE NOTICE** that upon the 1) Affidavit of Jane Doe sworn to on June 9, 2017, 2) the Affirmation of Respondent Counsel sworn to on June 9, 2017, and 3) upon all the proceedings in this case to date, Respondent is making a motion to dismiss before the Onondaga County Family Court, before the **Honorable Judge** at 401 Montgomery Street, Syracuse, NY 13202 on **July 1, 2017 at 9:15 a.m.** or as soon thereafter as the parties can be heard, requesting the following relief;

**RELIEF REQUESTED AND GROUNDS:**

- 1) Dismissal of Petitioner's neglect petition under **CPLR 3211(a)(7), and relevant case law**, with prejudice.
- 2) Such other, further, and different relief as the Court deems just and appropriate.

**PLEASE TAKE FURTHER NOTICE** that answering affidavits must be served at least two days before the return date of the motion.

Respectfully submitted,

DATED: June 9, 2017

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Counsel for Respondent  
Address for Counsel  
Ph:  
Fax:

STATE OF NEW YORK  
ONONDAGA COUNTY FAMILY COURT

In the matter of

**Child A (DOB)**  
**Child B (DOB)**

Family File #:  
Docket #: NN-

Children under the age of Eighteen Years of Age  
Alleged to be Neglected by

**AFFIDAVIT IN SUPPORT OF  
MOTION TO DISMISS**

**Jane Doe**

Respondent.

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**Jane Doe**, hereby affirms under penalty of perjury:

1. I am the respondent in this case. I make this affidavit in support of my motion to dismiss the petition in the above captioned matter.

**MOTION TO DISMISS**

2. The petition filed by the Onondaga County Department of Children and Family Services in the above captioned matter should be dismissed as insufficient for failure to allege with any specificity instances of neglect or abuse.
3. Allegation (a) 1 of the neglect petition discusses that I failed to provide adequate supervision and guardianship of my children on June 14, 2016. This allegation is based solely on the fact that I was a domestic violence victim that day, and that, unfortunately, my children witnessed my attack. I had no control over John Smith's actions. I did not even allow him into the home as supported by the allegation which states "He forced his way into her house." John Smith was arrested due to this attack of which I was the victim.
4. Allegation (a) 2 of the neglect petition is entirely false. As allegation a (1) states, John Smith was arrested June 20, 2015, and was still incarcerated on July 30, 2015.

Therefore he was incarcerated when the allegations state that on July 18, 2015, I engaged in an altercation with him. It is impossible for me to have engaged in a domestic violence altercation in the presence of my children since he was incarcerated at that time.

5. Even if allegation a (2) were deemed to be true, the allegation is not adequate for a finding of neglect.
6. The current petition, Docket numbers; NN-00000,NN-00001 should be dismissed as the Petitioner has failed to state a cause of action.

**WHEREFORE**, for the foregoing reasons, I request that the petition be dismissed with prejudice and that the Court grant whatever further relief it deems just and proper.

---

Jane Doe

Before me on this 9<sup>th</sup> day of June, 2017, Jane Doe  
who did affirm the foregoing under penalty of perjury

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Notary Public

STATE OF NEW YORK  
ONONDAGA COUNTY FAMILY COURT

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In the matter of

**Child A (DOB)**  
**Child B (DOB)**

Family File #:  
Docket #: NN-

Children under the age of Eighteen Years of Age  
Alleged to be Neglected by

**AFFIRMATION IN SUPPORT  
OF MOTION TO DISMISS**

**Jane Doe**

Respondent.

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**Respondent Counsel, Esq.**, an attorney at law, duly authorized to practice before the courts of this State, affirms to be true the following:

1. I am an attorney duly licensed to practice law in the State of New York. I am employed by <insert agency name> as a staff attorney assigned to represent indigent clients in the Onondaga County Family Court.
2. I represent the Respondent, Jane Doe, in an Article 10 proceeding under the Family Court Act in the above captioned matter.
3. I make the following affirmation in support of a Motion to Dismiss Petitioner's Neglect Petition, which alleges Ms. Doe has neglected her children, Child A and Child B.
4. Petitioner's Neglect Petition, filed and entered on October 4, 2016, should be dismissed on the basis of CPLR 3211 (a)(7) as the pleadings fail to state a cause of action. The pleadings are not sufficient to establish a finding of neglect.
5. The allegations contained in the petition occurred in June of 2016, but the petition was not filed and entered until October 4, 2016. If the County had serious concerns about the children being neglected, they waited almost an entire four months to take legal action.
6. Further, the petition should be dismissed based on Nicholson v. Scoppetta, 3N.Y.3d 357

(N.Y., 2004), which sets the precedent for what New York State considers neglect. This case law also establishes legal precedent as to New York States stance on the correlation between domestic violence and findings of neglect. The allegations of this case do not amount to a neglect finding.

7. The first allegation a (1) of the Petition states John Smith forced his way into Ms. Doe's home and attacked her. Upon information and belief, Ms. Doe did not allow or invite him into the home. She had no control over his actions and was not in a position to physically prevent him from coming into the home. John Smith, per the allegation, was the only aggressor.
8. The second allegation a (2), upon information and belief is not only false, but if found to be true does not meet the standard to warrant a finding of neglect. The allegation describes a mutual combat. There are no facts set forth that there was any impairment or imminent risk of impairment to the children, which must be proved for a finding of neglect.
9. A dismissal under CPLR 3211 (a) (7) is proper in this case as the Petitioner fails to state a cause of action for which the relief they are seeking can be granted.
10. FCA §1012 provides:

“ (f) "Neglected child" means a child less than eighteen years of age (i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care (A) in supplying the child with adequate food, clothing, shelter or education in accordance with the provisions of part one of article sixty-five of the education law, or medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so; or (B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court; provided, however, that where the respondent is voluntarily and regularly participating in a rehabilitative program,

evidence that the respondent has repeatedly misused a drug or drugs or alcoholic beverages to the extent that he loses self-control of his actions shall not establish that the child is a neglected child in the absence of evidence establishing that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as set forth in paragraph (i) of this subdivision; or (ii) who has been abandoned, in accordance with the definition and other criteria set forth in subdivision five of section three hundred eighty-four-b of the social services law, by his parents or other person legally responsible for his care.

11. Child A and Child B do not fit the definition of neglected children. The allegations fail to allege the children's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of Jane Doe's failure to exercise a minimum degree of care.
12. Nicholson v. Scoppetta, discusses what amounts to a showing of neglect by the Petitioner. Nicholson v. Scoppetta, 3N.Y.3d 357 (N.Y., 2004). The moving party must, by a preponderance of the evidence, show that; "the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship." *Id.* at 369. The drafters of Article 10 were "*deeply concerned*" that an imprecise definition of child neglect might result in "*unwarranted state intervention into private family life.*" *Id.* According to the Court in *Nicholson*, there must be proof of "actual or an imminent danger of, emotional or mental impairment to the child." *Id.* at 370. The Court further states, "This prerequisite to a finding of neglect ensures that the Family Court, in deciding whether to authorize state intervention will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior." *Id.*
13. The Court in Nicholson v. Scoppetta were posed with the question of; "Does the definition of a 'neglected child' under N.Y. Family Ct. Act § 1012(f), (h) include instances in which the sole allegation of neglect is that the parent or other person legally responsible for the child's

care allows the child to witness domestic abuse against the caretaker?" Id. at 369. The court answered this question by stating:

“ We understand this question to ask whether a court reviewing a Family Court Act article 10 petition may find a respondent parent responsible for neglect based on evidence of two facts only: that the parent has been the victim of domestic violence, and that the child has been exposed to that violence. *That question must be answered in the negative.* Plainly, more is required for a showing of neglect under New York law than the fact that a child was exposed to domestic abuse against the caretaker. Answering the question in the affirmative, moreover, would read an unacceptable presumption into the statute, contrary to its plain language.” Id.

14. The allegations alone indicate Jane Doe was a victim of domestic violence. However, they also allege her children were exposed to this violence. These two allegations, if proven to be true, cannot meet the standard necessary for a finding of neglect. *Nicholson* is a Seminole case and very clearly establishes that being a victim of domestic violence with your children present is not enough to establish a finding of neglect.

**WHEREFORE**, the undersigned respectfully requests that this Court dismiss the petition with prejudice.

Dated:

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Counsel for Respondent  
Frank H. Hiscock Legal Aid Society  
351 S. Warren Street  
Syracuse, NY 13202  
Ph:  
Fax:

STATE OF NEW YORK  
ONONDAGA COUNTY FAMILY COURT

In the matter of

**Child C (DOB)**

Child under the age of Eighteen Years of Age  
Alleged to be Neglected by

**Jane Doe**

Respondent.

**Family File #**  
**Docket No.**

**AFFIRMATION IN  
OPPOSITION TO MOTION  
FOR SUMMARY JUDGMENT**

**Respondent Counsel, Esq.**, an attorney at law, duly authorized to practice before the courts of this State, affirms to be true the following:

1. I am an attorney duly licensed to practice law in the State of New York. I am employed by **<insert name of agency>** as a staff attorney assigned to represent indigent clients in the Onondaga Family Court.
2. I represent the Respondent, Jane Doe, in an Article 10 proceeding under the Family Court Act in the above captioned matter and as such I am fully familiar with the facts and circumstances of this case.
3. I make the following affirmation in opposition to the Motion for Summary Judgment filed by the attorney for the child under CPLR §3212 and oppose a finding that Child C is derivatively neglected.

**STATEMENT OF FACTS**

4. The allegations contained in the petition allege that Child C has been derivatively neglected based on an adjudication that Jane Doe neglected Child C's half siblings, and that the mother has not fully ameliorated the conditions that led to the neglect adjudication of said siblings. The previous adjudication allegations were solely domestic violence related. Despite the decision being made October 19, 2016, the allegations that led to that decision

are much older as the original neglect petition was filed on or about October 4, 2015. The litigation of the petition with regards to the two older siblings was drawn out as the first trial started in March 2016, then there were multiple oral and written amendments which resulted in delayed litigation and a decision made a year after the petition was originally filed. The hearing on October 7, 2016, was proximate in time but it is questionable if the alleged events should be considered proximate enough in time. When the initial Order of Protection was issued Jane Doe was alone in the court room without being assigned legal counsel and was not assigned counsel until after the order was discussed. (Exhibit A). When legal counsel was in the court room, the order of protection was not discussed. (Exhibit A). The Court also indicated they did not want to re-blame the victim and it appeared she was acting appropriately in the actions she had taken. (Exhibit A).

5. The current petition states that Child A and Child B were removed from Jane Doe on June 2, 2016. The alleged safety factor presented for the removal on that date was that John Smith, Ms. Doe's alleged abuser, had been in the home. The decision was based on alleged acts and or omissions prior to June 2, 2016. Mr. Smith has been incarcerated since October 2, 2016 and remains incarcerated as of the filing of this motion on March 3, 2017 (Exhibit B). Child C was not born until months after John Smith was already incarcerated. Mr. Smith is the only person she is alleged to have been engaged in domestic violence with.
6. The allegation that Jane Doe has not fully ameliorated the conditions that led to the neglect and removal of Child A and Child B is in dispute. The petition fails to outline what exactly Jane Doe has done or has failed to do in order to ameliorate the conditions that led to the prior adjudication, nor has this been outlined in the motion for summary judgment. AFC cites the court in Exhibit G of his affirmation, which states, "Jane Doe did not participate in

an investigation against John Smith after the incident.” Upon information and belief, Ms. Doe has been cooperating with investigators and the District Attorney’s office. Upon information and belief, Ms. Doe has ameliorated the conditions that led to the prior adjudication and removal as she has a full stay away criminal Order of Protection against John Smith, and has assisted in his prosecution. The Judge cited alleged continual contact in deciding that Child A and Child B were neglected. Upon information and belief, Ms. Doe does not have any contact with John Smith for over six months. Furthermore, she obtained a counselor for individual counseling.

7. Child C was sent home with Ms. Doe from the hospital, and remains with her. The Department of Children and Family Services visits with Ms. Doe and Child C approximately two times every month and find Child C is appropriately cared for. It should also be noted that the prior removal and neglect adjudication of Child A and Child B is in dispute and a notice of appeal has been filed and served.

### **LEGAL ANALYSIS**

8. The main question that must be answered regarding a Motion for Summary Judgment is whether or not there are any triable issues of fact. Summary Judgment is considered a very drastic procedural device. Matter of Suzanne RR.v. Wendy SS., A.D.3d 101, 1013 citing Matter of Hannah UU., 300 AD2d 942, 943, 753 nys2D 168 (2002). There are triable issues of fact as Child C’s case is easily differentiated from the case regarding her siblings. The triable issues of fact include but are not limited to whether or not the alleged conditions still exist that lead to the removal and neglect adjudication of Child A and Child B, and whether or not Child C actually fits the definition of a neglected child under Article 10. Not a single one of these questions has been answered by the AFC’s Affirmation, therefore his

motion for summary judgment must be dismissed. The AFC has not made any offer of proof which is required to grant summary judgment, other than what he states in his affirmation as facts and he attached petitions and orders that pertain to the prior case but have nothing to do with Child C, a child who was not born until a month after the decision was rendered. These are devoid of any evidentiary value in this current case. Upon information and belief, Jane Doe has engaged in services, allows announced and unannounced visits into the home, has safe and stable housing, and is not in contact with John Smith. There have been changes since the prior adjudication and those issues must be litigated.

9. FCA §1012 provides:

“ (f) "Neglected child" means a child less than eighteen years of age (i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care (A) in supplying the child with adequate food, clothing, shelter or education in accordance with the provisions of part one of article sixty-five of the education law, or medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so; or (B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court; provided, however, that where the respondent is voluntarily and regularly participating in a rehabilitative program, evidence that the respondent has repeatedly misused a drug or drugs or alcoholic beverages to the extent that he loses self-control of his actions shall not establish that the child is a neglected child in the absence of evidence establishing that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as set forth in paragraph (i) of this subdivision; or (ii) who has been abandoned, in accordance with the definition and other criteria set forth in subdivision five of section three hundred eighty-four-b of the social services law, by his parents or other person legally responsible for his care.

10. The motion for summary judgment provides no evidence that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as

a result of the failure of Jane Doe to exercise a minimum degree of care of Child C. There are no facts set forth in the petition or the motion for summary judgment that could result in a conclusion that Child C fits this definition.

11. The crux of the allegations rest on derivative neglect and the summary judgement motion's sole argument is Child C's half siblings were adjudicated neglected thus she must be too. In re Jocelyne J., a 2004 Fourth Department, Appellate Division case, discusses derivative neglect. In re Jocelyne J., 8 A.D.3d, 978 (4<sup>th</sup> Dept., 2004) the Court held that "Although Family Court Act §1046(a)(i) allows evidence of abuse or neglect of one sibling to be considered in determining whether other children in the household were abused or neglected, that statute does not mandate a finding of derivative neglect." Id. at 979. In re Jocelyne J was a case that involved children in the same household, and the Court held that the subject child of the new petition had not been neglected or in substantial risk of harm, they held that the subject child was appropriately cared for. In the case involving Child C, the alleged occurrences cited in the decision that led to that court's adjudication occurred well before Child C's birth. Furthermore, John Smith was incarcerated well before the child was even born and remains incarcerated.
12. In the Matter of Madison J.S., the Family Court in Steuben County adjudicated Bentley P.S. as a neglected child but did not find a derivative finding regarding the child's siblings. In the Matter of Madison J.S., 136 a.d.3D 1404 (February 11, 2016) the Petitioner appealed from that decision and the Fourth Department affirmed the finding of the lower court. Id. That opinion discusses that the Family Court Act, Article 10 does not **mandate** a finding of derivative neglect when another child is adjudicated to have been neglected, and that such evidence may not serve as the sole basis for a finding of neglect. Id. At 505. The sole basis

for the current petition involving Child C is the prior decision made in regards to the child's half siblings.

13. The AFC cited Matter of Xiomara D., 96A.D.3d 1239 (2012) to support his motion, but Matter of Xiomara D. is a vastly different case than the instant case. In Matter of Xiomara D., there were two prior neglect adjudications for the mother and father based upon "repeated and escalating acts of serious domestic violence committed against each other in the children's presence." Matter of Xiomara D. at 1241. In Matter of Xiomara D. there was a Family Court Act §1028 hearing where testimony was taken surrounding the families current status and at that hearing it was revealed that the couple were currently still residing with one another. Id. at 1241. In Matter of Xiomara D. not only was the couple still living together but they intended to live together despite the fact that neither of them had completed a domestic violence program successfully. Id. at 1242. This evidence was cited in the Petitioner's motion for summary judgment and was the reason why summary judgment was granted. Id. In the case at hand there is no testimony with regards to Child C's status or the care she is receiving. The court and parties in Matter of Xiomara D. were able to assess the families' situation and their continued cohabitation through testimony at a hearing seeking a return of the child and attached this evidence to the motion for summary judgment. Nothing even remotely similar has occurred with the current case, nor has there been an offer of proof from petitioner that Child C is a neglected child. Furthermore, in Matter of Xiomara D. both parents were perpetrating violence against one another, neither was solely a victim as has been demonstrated in Jane Doe's case.
14. The AFC also cites Matter of Sumaria D. (Madelyn D.), 121 A.D.3d 1203, which is a case that involves the same parents as Matter of Xiomara D., 96A.D.3d 1239 (2012). The

parents made an admission to mutual acts of domestic violence in the children's presence. Matter of Sumaria D. at 1206. Sumaria D. is the youngest of seven total children, and following a Family Court Act §1027 hearing the petitioner moved for summary judgment as it pertained to the neglect petition. Matter of Sumaria D. (Madelyn D.), 121 A.D.3d 1203-1205. Again this is easily differentiated from Jane Doe's case as there was a hearing in Matter of Sumaria D. where the court and parties were able to assess the parent's progress and whether continued acts of domestic violence were occurring then the petitioner filed a motion for summary judgment and it was granted. There has been no hearing at all as it pertains to Child C.

15. In the Matter of Suzanne RR.v. Wendy SS., A.D.3d 1012 the lower court wrongfully granted petitioners motion for summary judgment in an Article 10 proceeding. In Matter of Suzanne RR, the courts stated "summary judgment remains a drastic procedural device which will be found appropriate only in those circumstances when it has been clearly ascertained that there is no triable issue of fact outstanding; issue finding; rather than issue determination, is its function." Matter of Suzanne RR.v. Wendy SS., A.D.3d 101, 1013 citing Matter of Hannah UU., 300 AD2d 942, 943, 753 nys2D 168 (2002). Instead of alleging the facts and circumstances which lead to a prior adjudication had not been ameliorated, the petition in Matter of Suzanne RR offered alleged proof of why the circumstances were not ameliorated, which was that the mother was in a relationship with the subject child's father which was an indicator that her judgment as a parent had not improved. Id. at 1014. The child's father was a different man than the paramour who was the reason why the petitioner had a prior adjudication. Id. In Matter of Suzanne RR, the petitioner "failed to demonstrate the *absence* of any material issue of fact as to warrant a

grant of summary judgment.” Id. Jane Doe’s case is similar to this matter as there are material facts at issue and the Attorney for the Child has failed to demonstrate an *absence* of any material issue of fact. The material issues of fact include whether or not there is a fundamental flaw in Jane Doe’s understanding of her responsibilities as a parent, and whether or not she has ameliorated the issues that lead to the prior adjudication. These material issues of fact are best heard at a fact finding hearing. To deprive Jane Doe a fact finding hearing in this matter would be a violation of her right to due process as her case does not meet the standards necessary to grant summary judgment.

16. In Matter of Miranda F. (Kevin D.), 91 A.D.3d 1303 (2012), a fourth department case in which petitioner was granted summary judgment pertaining to an abuse petition and subsequently overturned by the Appellate Division, 4<sup>th</sup> Department. In this case the Family Court erred in “granting those parts of the motion with respect to the father’s biological daughters, inasmuch as petitioner failed to submit *requisite evidence of derivative abuse in support of its motion for summary judgment with respect to them.*” Id. 1305. There must be evidence submitted with a summary judgment motion pertaining to the subject child being neglected and/or abused, and the petitioner has failed to do so. The attached documents to Petitioners motion for summary judgment all pertain to Child C’s siblings. The AFC has failed to submit any evidence of neglect or derivative neglect to support the motion for summary judgment, therefore the motion must be denied.

### CONCLUSION

17. The motion for summary judgment as well as the current neglect petition fail to state allegation that provides specific detail of what Jane Doe has done or has not done that has led the County and the attorney for the child to the conclusion that she has not ameliorated

the issues that led to the prior adjudication and removal of Child A and Child B. There is no offer of proof in the summary judgment motion and no allegation in the current neglect petition that could reasonably conclude that Child C's physical, mental or emotion well-being is impaired or in danger of becoming impaired. Child C is not a neglected child in need of aid or assistance by this court, she is appropriately cared for by her mother and she most certainly does not fall within the definition of FCA §1012 as a neglected child. The Attorney for the Child has failed to prove there are no triable issues of fact, therefore the motion for summary judgment must be denied.

**WHEREFORE**, the undersigned respectfully requests that this Court not grant the summary judgment motion and deny with prejudice.

Dated: June 9, 2017

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Counsel for Respondent  
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Syracuse, NY 13202  
Ph: (315) 218-0162  
Fax: (315) 472-2819



Clifton Springs Hospital & Clinic  
 2 Coulter Road  
 Clifton Springs, NY 14432

### Authorization for Release or Use of Medical Information

Patient Name: \_\_\_\_\_ Date of birth: \_\_\_\_\_  
 Address: \_\_\_\_\_ Phone: \_\_\_\_\_  
 City/State/Zip: \_\_\_\_\_

<input type="checkbox"/> I authorize Clifton Springs Hospital & Clinic to <b>SEND</b> information <b>TO:</b>	<input type="checkbox"/> I authorize Clifton Springs Hospital & Clinic to <b>RECEIVE</b> information <b>FROM:</b>
Name of Provider/Person/Facility _____	Name of Provider/Person/Facility _____
Address _____	Address _____
City, State, Zip Code _____	City, State, Zip Code _____
Phone # / Fax # (include area code) _____	Phone # / Fax # (include area code) _____
Attention _____	Attention _____

**Purpose for this request:** (check all that apply)

- Healthcare                       Insurance Coverage  
 Patient Request                   Legal Request                   Other – specify \_\_\_\_\_

**Type of information requested:** (check all that apply and **MUST** include date(s) of service)

- X-Ray reports                       Operative Report                   Discharge Summary                   History & Physical  
 Laboratory test results               Other (please specify) \_\_\_\_\_  
 Complete medical record from: \_\_\_\_\_ to \_\_\_\_\_

*Note: Mental health records are not included in this authorization unless you specifically complete the following section giving us permission to disclose this information.*

**The records requested are to include:**  **Mental Health Treatment Records**

Information that I wish **NOT** to have disclosed, if any, includes:

\_\_\_\_\_

**I understand that:**

- The requested information may contain alcohol, drug abuse, psychiatric, mental health, HIV testing, HIV results or AIDS information. (Release/disclosure of HIV-related information requires additional authorization on form NYS DOH2557 or OCA 960. Release/disclosure of addictions information requires an additional authorization on form TRS-2).
- I may refuse to sign this authorization and that it is strictly voluntary.
- My right to Healthcare treatment, payment, enrollment or eligibility for benefits is not conditioned on this authorization.
- I may revoke this authorization at any time by submitting a written request to the Privacy Officer, except where disclosure has already been made in reliance on my prior authorization.
- If the person or facility receiving this information is not a health care or medical insurance provider covered by privacy regulations, the information stated above could be redisclosed.
- There may be a charge for the requested copies of the records.
- The information being released may be faxed in cases of medical necessity.
- This authorization will remain in full force and effect until it expires 90 days from the date of this authorization or \_\_\_\_\_ (insert date)
- I have read the above and authorize the disclosure of the protected health information as stated. I also acknowledge that I may receive a copy of this form as requested.

Signature of Patient or Representative \_\_\_\_\_ Date: \_\_\_\_\_

Relationship to patient (if Representative) \_\_\_\_\_

# Syracuse Behavioral Healthcare Consent for Release of Confidential Information

I \_\_\_\_\_ DOB \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_ SS# \_\_\_\_\_

authorize SBH to disclose/redisclose to ( ), to obtain from ( ), or to exchange with (X):

\_\_\_\_\_ Phone ( ) \_\_\_\_\_  
Name of Person/Agency/Class of Recipients

Address: \_\_\_\_\_

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The purpose or need for disclosure/redisclosure is:

- |  |  |   |
|--|--|---|
| <input type="checkbox"/> ( ) Coordination of treatment | <input type="checkbox"/> ( ) Eligibility for benefits/services | <input type="checkbox"/> ( ) Assist with legal concerns |
| <input type="checkbox"/> ( ) Coordination of referrals | <input type="checkbox"/> ( ) Collateral contacts               |   |
| <input type="checkbox"/> ( ) Contact referral source   | <input type="checkbox"/> ( ) Emergency notices                 | <input type="checkbox"/> ( ) Other _____                |
- Specify

I understand that my treatment records are protected under Federal Law 42 CFR Part 2 and the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 CFR pts 160 and 164 and cannot be disclosed/re-disclosed without my written consent unless otherwise provided for in the federal regulations governing the confidentiality of the alcohol and drug abuse patient. I also understand that I may revoke this consent any time except to the extent that action has been taken in reliance upon it. I understand that in any event the consent will expire as described below:

- THIS CONSENT EXPIRES ON (check only one)
- ( ) 90 Days following my most recent face to face visit at SBH
- (X) 90 Days following the resolution of the purpose described above
- ( ) Other Conditions or Event: 6 months following completion of treatment

Executed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_  
Month

X \_\_\_\_\_ X \_\_\_\_\_  
Signature of Client/Participant Signature of Parent/Guardian if Required

X \_\_\_\_\_  
Signature of Staff Witnessing Signature

### PROHIBITION OF REDISCLOSURE

This information has been disclosed to you from records protected by Federal and New York State law and Federal confidentiality rules (42 CFR Part 2). The Federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person to whom it pertains or as otherwise permitted by 42 CFR Part 2 and the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 CFR Pts 160 and 164. A general authorization for the release of medical or other information is NOT sufficient for this purpose. The Federal rules restrict any use of the information to criminally investigate or prosecute any alcohol or drug abuse patient.

- |  |              |                   |
|--|--------------|-------------------|
| SBH Evaluation Center: 714 Hickory Street, Syracuse, New York 13203        | 315.701.1516 | Fax: 315.701.1519 |
| SBH Evaluation Center: 1350 University Avenue, Rochester, New York 14607   | 585.287.5622 | Fax: 585.287.5628 |
| Inpatient THE WILLOWS: 847 James Street, Syracuse, New York 13203          | 315.492.1184 | Fax: 315.492.0367 |
| Outpatient Services: 847 James Street, Syracuse, New York 13203            | 315.471.1564 | Fax: 315.471.2531 |
| Men's Halfway House: 121 Green Street, Syracuse, New York 13203            | 315.472.4442 | Fax: 315.478.3849 |
| Men's Halfway House: 3606 James Street, Syracuse, New York 13206           | 315.701.4578 | Fax: 315.701.4582 |
| Men's Halfway House: 168 Lincoln Avenue, Syracuse, New York 13204          | 315.218.6492 | Fax: 315.214.5764 |
| Women's Halfway House: 1074 W. Genesee Street, Syracuse, New York 13204    | 315.463.9266 | Fax: 315.463.1519 |
| Women & Children: 3600 James Street, Syracuse, New York 13206              | 315.437.1802 | Fax: 315.701.1864 |
| Residential Services: 770 James Street, Suite 139 Syracuse, New York 13203 | 315.472.9964 | Fax: 315.472.9655 |
| SBH Administration: 770 James Street Suite 141, Syracuse, New York 13203   | 315.474.5506 | Fax: 315.474.1554 |

Syracuse Recovery Services, LLC
17 Main St. Suite 411, Cortland, NY 13045
Telephone (607) 756-4167 Fax (607) 753-0600

CONSENT FOR RELEASE OF CONFIDENTIAL HEALTH INFORMATION

I \_\_\_\_\_, D.O.B., \_\_\_\_/\_\_\_\_/\_\_\_\_, authorize Syracuse Recovery Services to [x] obtain from and/or [x] disclose to:

Name: \_\_\_\_\_ Phone ( ) \_\_\_\_\_
(Agency/Person) Fax ( ) \_\_\_\_\_

Address: \_\_\_\_\_

The type of information to be obtained or disclosed is as follows:

- Obtain Disclose Obtain Disclose
[x] [x] Involvement in program [x] [x] Progress in treatment
[x] [x] Psychosocial evaluation [x] [x] Psychosocial testing
[x] [x] Alcohol/Drug evaluation [x] [x] Medication List
[x] [x] Treatment Plan [x] [x] Discharge summary
[x] [x] Lab results (urine screens/alco-sensor results) [x] [x] Recommendations
[x] [ ] Other (please describe) : \_\_\_\_\_ [x] [ ] PPD Results

The information for which I'm authorizing disclosure will be used for the following purpose:

- [ ] My personal records [ ] Insurance reimbursement
[ ] Sharing with other health care providers as needed [ ] Referral to other agencies/providers
[x] Coordination of treatment [ ] Contact Referral Source
[ ] Legal Concerns [ ] Collateral contact
[ ] Probation/Parole requirements [ ] Other (please describe) \_\_\_\_\_

I understand that I have a right to revoke this authorization at any time. I understand that if I revoke this authorization, I must do so in writing and present my written revocation to the agency director. I understand that the revocation will not apply to information that has already been released in response to this authorization. I understand that the revocation will not apply to my insurance company when the law provides my insurer with the right to contest a claim under my policy.

This authorization will expire: [ ] \_\_\_\_/\_\_\_\_/\_\_\_\_ (Date)
[ ] Six months from date of signature
[x] 90 days following discharge from treatment

If I fail to specify an expiration date or event, this authorization will expire six months from the date on which it was signed. I understand authorizing the use or disclosure of the information identified above is voluntary. I need not sign this form to ensure healthcare treatment.

Signature of patient or legal representative \_\_\_\_\_ Date \_\_\_\_\_
If signed by legal representative, relationship to patient: \_\_\_\_\_

Signature of Witness \_\_\_\_\_ Date \_\_\_\_\_

This information has been disclosed to you from records protected by Federal confidentiality rules (42 C.F.R. Part 2). The Federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person to whom it pertains or as otherwise permitted by 42 C.F.R. Part 2 and the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 C.F.R. Parts 160 and 164. A general authorization for the release of medical or other information is NOT sufficient for this purpose. The Federal rules restrict any use of the information to criminally investigate or prosecute any alcohol or drug abuse patient.

**Conifer Park AUTHORIZATION TO RELEASE INFORMATION FROM THE PATIENT RECORD**

PATIENT NAME	DATE OF ADMISSION	DATE OF BIRTH	PATIENT NUMBER

I do hereby consent and authorize Conifer Park, Inc. to obtain from and release to:

NAME OF ORGANIZATION	NAME OF PERSON AND/ OR POSITION
STREET ADDRESS, INCLUDING APARTMENT OR SUITE NO. IF APPLICABLE	
CITY, STATE AND ZIP CODE	
PHONE NUMBER, INCLUDING AREA CODE	FAX NUMBER INCLUDING AREA CODE

I authorize Conifer Park clinical, medical, administrative, and clerical personnel to release information about me as follows:

**The following information pertaining to this admission:**

- |   |   |
|---|---|
| <input type="checkbox"/> Presence in treatment (admit/ discharge dates)     | <input type="checkbox"/> Educational discharge summary                  |
| <input type="checkbox"/> Medical history and physical examination           | <input type="checkbox"/> Immunization records                           |
| <input type="checkbox"/> Diagnosis / brief description progress / prognosis | <input type="checkbox"/> Results of diagnostic tests and testing (labs) |
| <input type="checkbox"/> Discharge summary / Aftercare Plan                 | <input type="checkbox"/> Treatment plan                                 |
| <input type="checkbox"/> History and behavior related to diagnosis          | <input type="checkbox"/> Legal history                                  |
| <input type="checkbox"/> Psychosocial / Diagnostic Summary                  | <input type="checkbox"/> Educational records, achievements, assessments |
| <input type="checkbox"/> Psychiatric / Psychological consults               | <input type="checkbox"/> Other: _____                                   |

**This information is needed for the following purpose(s):**

- |   |   |
|---|---|
| <input type="checkbox"/> To provide ongoing treatment/ continuing care  | <input type="checkbox"/> To provide educational services                      |
| <input type="checkbox"/> Obtain insurance, employment, government benefits  | <input type="checkbox"/> Coordinate services with authorized school officials |
| <input type="checkbox"/> To coordinate treatment efforts with my family/ concerned person   |   |
| <input type="checkbox"/> To coordinate treatment and continuing care efforts with my employer   |   |
| <input type="checkbox"/> To coordinate educational planning and re-entry program with school persons  |   |
| <input type="checkbox"/> To enable judges, attorneys, probation/ parole officers to support treatment goals & make legal decisions on my behalf |   |
| <input type="checkbox"/> Other: _____   |   |

I understand that I need not consent to the release of information in order to obtain services. I choose to do so willingly and voluntarily for the purpose(s) specified above. The duration of this authorization is for this admission, and no longer than One year unless I specify a date, event or condition upon which it will expire sooner. I understand that I may revoke this authorization at any time by notifying Conifer Park Department of Health Information Management in writing, except to the extent that action has been taken in reliance on my authorization. I understand that I will be expected to pay .75 per page for copies of records sent for purposes other than to provide for continuing care.

Specify date, event or condition upon which authorization expires sooner than One year from signing.	
Patient Signature	Date
Parent or Legal Guardian Signature	Date
Legal Representative Signature	Date
Witness Signature	Date

AM-14 Rev. 04/03

**ALL INCLUSIVE**

This information has been disclosed to you from records protected by Federal confidentiality rules (42 CFR Part 2). The Federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person to whom it pertains or as otherwise permitted by 42 CFR Part 2. A general authorization for release of medical or other information is NOT sufficient for this purpose. The Federal rules restrict any use of the information to criminally investigate or prosecute any alcohol or drug abuse patient. Additionally, these records are protected by 45 CFR Parts 160 and 164 (HIPAA).

**FAMILY COURT  
STATE OF NEW YORK  
COUNTY OF ONONDAGA**

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In the Matter of

[Neglected Childs Name]

Family File #

On Behalf Of Child Under the Age of  
Eighteen Years Alleged to be  
Abused or Neglected by

**DEMAND FOR  
DISCOVERY AND  
INSPECTION**

Darlene Tester,

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**Respondent(s).**

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**PLEASE TAKE NOTICE** that pursuant to FCA 1038 and CPLR 3120, the Respondent, **CLIENT NAME**, hereby demands production of the following on or before twenty (20) days from the date of service of this notice, the following documents and records in your possession custody and control, to wit:

- A. Any and all Child Protective or Child Preventive Services reports and records regarding the children and/or the Respondent(s), including but not limited to all caseworker notes, educational records and information, medical information and records, psychiatric or psychological records and information, alcohol and substance abuse treatment records and information, summary of conversations and contacts, and photographs.
- B. All Foster Care records pertaining to the care and custody of the child(ren), including caseworker notes and medical information, summaries of conversations and contacts, and photographs.

The purpose of said production of said documents is for the inspection by the Frank H. Hiscock Legal Aid Society or someone acting on its behalf by means of making notes and to permit copies to be made thereof by means of the use of a copying machine.

**PLEASE TAKE NOTICE** that this is a continuing demand and the Respondent shall object to any evidence not produced pursuant to this request being introduced at the trial of this matter.

Dated:

Sincerely,

ATTORNEY NAME AND SIGNATURE



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## **Representation in Family Court Proceedings**

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### **Topic Two**

### **Case Update on Third Parties and Relatives**



**NOTEWORTHY CHILD WELFARE CASELAW 2016-2017, AND RECENT  
ATTORNEY-FOR-THE-CHILD CASE LAW UNDER RULE 7.2**

**Gary Solomon  
The Legal Aid Society, Juvenile Rights Practice  
May 10, 2017**

**I. Abuse/Neglect, Permanency, Termination Of Parental Rights And Custody**

**Abuse/Neglect Investigations Under FCA § 1034: Order To Produce Child**

*Matter of Issac C.*, [Index Number Redacted by Court], NYLJ 1202783197542, at \*1 (Fam., BX, Decided March 29, 2017)

Upon an ex parte appearance by ACS seeking an order pursuant to FCA § 1034 granting access to the children in connection with allegations that the child Issac (age nine and a half at the time) sexually abused one of his siblings (age two and a half at the time), a judge ordered that the children be produced for observation and interviews at the Montefiore Child Advocacy Center. The CAC protocol only allows for the presence of law enforcement staff and the ACS caseworker in a two-way mirror room, not the presence of the parents or counsel.

The attorneys for Issac and the mother move to intervene as of right or by permission, and to vacate the ex parte order.

Upon a hearing, the Court first notes that the issue is whether ACS has established probable cause under § 1034 where: 1) a state central registry report was made almost eight months prior to the filing of the § 1034 application; 2) ACS closed out their investigation, but kept the case open despite observing a video of the alleged abuse and finding none; and 3) ACS has observed the children on numerous occasions and did not report a risk of harm or safety concerns.

The Court denies the application, noting, inter alia, that intervention as of right or by permission is authorized by CPLR §§ 1012 and 1013, and it is clear that Issac's and the parents' interests are implicated; that Issac's attorney has raised concerns about a possible violation of Issac's due process rights; that "it is not in the children's best interest, given their vulnerability and young age, to be subjected to such an intrusive interview by a CAC where the law enforcement personnel would be present via a two way mirror and where charges can be filed against Issac"; and that the parents should not be forced to cooperate based on an untimely application that apparently is being used as a means to force the parents and Issac to comply further with ACS.

*Practice Note:* FCA § 1034(2)(a) states as follows:

(i) Before a petition is filed and where there is reasonable cause to suspect that a child or children's life or health may be in danger, child protective services may seek a court order based upon:

(A) a report of suspected abuse or maltreatment under title six of article six of the social services law as well as any additional information that a child protective investigator has learned in the investigation; and

(B) the fact that the investigator has been unable to locate the child named in the report or any other children in the household or has been denied access to the child or children in the household sufficient to determine their safety; and

(C) the fact that the investigator has advised the parent or other persons legally responsible for the child or children that, when denied sufficient access to the child or other children in the household, the child protective investigator may consider seeking an immediate court order to gain access to the child or children without further notice to the parent or other persons legally responsible.

(ii) Where a court order has been requested pursuant to this paragraph the court may issue an order under this section requiring that the parent or other persons legally responsible for the child or children produce the child or children at a particular location which may include a child advocacy center, or to a particular person for an interview of the child or children, and for observation of the condition of the child, outside of the presence of the parent or other person responsible.

## **Right To Counsel: Parents/PLRs**

*In re X. McC.*, 140 A.D.3d 662 (1st Dept. 2016)

The First Department rejects respondent's contention that the agency violated his right to counsel when it prohibited counsel from attending a child safety conference. The right to counsel under FCA § 262(a) does not attach until the first court appearance by respondent, which occurred after the child safety conference.

*Matter of Joey J.*, 140 A.D.3d 1687 (4th Dept. 2016)

In this termination of parental rights proceeding, the Fourth Department rejects the mother's contention that a finding of ineffective assistance of counsel may be based solely on the fact that the attorney advised the mother to admit the allegations in the petition.

*Matter of Ritter v. Moll*, 148 A.D.3d 1427 (3d Dept. 2017)

The Third Department finds no violation of the father's right to be present and participate in the hearing regarding visitation where his attorney stated that the father was advised of the hearing date and the father failed to appear or contact the court or counsel, even after the court's oral ruling at the conclusion of the hearing, but prior to the issuance of a written order.

While counsel could have asked to be relieved in order to preserve the father's right to move to vacate any default order, counsel's tactical choice to participate did not constitute ineffective assistance, particularly given the possibility that the court would proceed and issue a decision on the merits rather than a default judgment.

*Matter of Turner v. Valdespino*, 140 A.D.3d 974 (2d Dept. 2016)

The Second Department reverses an order that, after a hearing, granted the father's petition for sole legal and physical custody where the family court instructed the mother not to consult with her attorney during recesses, which resulted in her being unable to speak to her attorney over extended periods of time. Although the issue is unpreserved, the Court reaches it in the interest of justice because the family court's conduct deprived the mother of due process.

## **Judicial And Attorney Ethics**

*Matter of Trinity E.*, 144 A.D.3d 1680 (4th Dept. 2016)

In this permanent neglect proceeding, the Fourth Department holds that the family court abused its discretion in not recusing itself from the dispositional hearing, and remits the case for a new hearing before another judge, where, the day after the finding of permanent neglect, the father made a death threat directed toward the court, the attorney for the child, the caseworker, and the police, the father was charged with making a terroristic threat, and an order of protection was issued against the father in favor of the court. The Court reaches this result "particularly in view of the order of protection...."

*Matter of Rovner v. Rantzer*, 145 A.D.3d 1016 (2d Dept. 2016)

The Second Department grants the father's motion to disqualify the mother's attorney, who is married to the former Family Court judge who presided over these proceedings, in light of, inter alia, the unrefuted statement by the attorney for the child that the attorney was present inside the judge's chambers on various occasions when the case was being heard, and the fact that the judge conducted two in camera interviews with the child.

## **Visitation**

*In re Daniel O.*, 141 A.D.3d 434 (1st Dept. 2016)

The First Department reverses an order granting respondents' motion for unsupervised visitation during the pendency of the abuse and neglect proceedings where the petitions allege that one of the children sustained life-threatening head injuries and rib fractures when he was only three months old and in respondents' exclusive care.

Given the serious allegations, it was an abuse of discretion to order unsupervised visitation without the benefit of a full fact-finding hearing. Continued supervised visitation is permissible.

*Matter of Rihana J.H.*, 147 A.D.3d 945 (2d Dept. 2017)

In this child protective proceeding, the Second Department concludes that since the Supreme Court's temporary order of protection did not state that it was "subject to" subsequent Family Court orders, the Family Court had no authority to permit "kinship visitation" supervised by the maternal grandmother.

While the Family Court is not limited by the criminal court's order where it expressly contemplates future Family Court amendment of terms pertaining to custody and visitation, the criminal court order governs until it is vacated or modified by the criminal court.

## **Placement Of Siblings**

*Matter of Jamel B.*, 53 Misc.3d 1206(A) (Fam. Ct., Kings Co., 2016)

On December 11, 2015, the Court, having already ordered the day before that ACS "make every effort" to place the children in the same home, again ordered ACS, "pursuant to FCA 1027-a, to place the Subject Children together in the same foster home in Brooklyn, no later than 1/10/2016." On February 10, 2016, the Court granted the attorney for the children's motion to compel compliance with the order. Subsequently, the AFC filed a contempt motion, and, on March 7, 2016, ACS moved for a modification of the order. The Court held a hearing upon the motions, which began on March 11, 2016 and concluded on May 31, 2016. On or about March 27, 2016, the children were placed together in a therapeutic foster home.

The Court finds ACS in contempt, rejecting ACS's contention that contempt cannot be found because it was unable to comply with the order prior to placement of the children together. ACS has failed to show that its inability to comply was not of its own making. ACS initially relied upon St. Christopher-Ottillie, and did not expand the search through ACS's Office of Placement Administration until two weeks after the deadline in the order. ACS failed to request any modification of the order until the AFC filed for contempt.

Good faith efforts alone do not constitute a defense to civil contempt. An act of disobedience, regardless of motive or intent, is sufficient. Efforts were in fact made to place the children together, but greater efforts could have been made to obtain responses from various agencies. Although ACS did face difficulty in finding one home that met the needs of these children, and the greatest failures were by the foster care agencies that did not respond in a timely way, even to OPA's request that they search for foster homes, ACS bears ultimate responsibility for the actions of the agencies.

Since no actual loss or injuries have been established, the Court, noting that it issued three separate orders that were violated, fines ACS the statutory amount of \$250 per child for each violation, or \$750 per child. The money is to be banked in trust for each child until he/she turns eighteen.

## **Article Ten Causes Of Action: Housing**

*Matter of Zachariah W.*, 2017 WL 1335370 (2d Dept. 2017)

ACS filed a neglect petition four days after the mother gave birth. During the initial days in the hospital,

the child was placed in the room with the mother, where she took appropriate care of him. However, when hospital personnel discovered that the mother only had income from public assistance and that she and the baby would not be accepted back into the home where the maternal grandmother was staying, they called ACS, which undertook an emergency removal of the child. No ACS worker provided the mother with housing information, including emergency housing information, or provided any supplies for the child.

The Second Department reverses the finding of neglect. ACS failed to prove that the mother did not supply the child with adequate food, clothing, and shelter although financially able to do so or offered financial or other reasonable means to do so.

## **Domestic Violence**

*Matter of Elizabeth B.*, 149 A.D.3d 8 (3d Dept. 2017)

The Third Department concludes that petitioner's application to have a Central Register report amended to be unfounded and expunged should be granted.

Petitioner's paramour, the father of the youngest child, physically assaulted her on two occasions. During the first incident, the paramour, while driving on a high speed road, punched petitioner in the arm and leg while their three-week-old child was in the backseat. The following day, the paramour struck petitioner in the back as she held the child, causing her to fall, and then choked and threatened her. This incident was observed by the eldest child. The indicated finding was based upon petitioner's delay in reporting the incidents, the fact that she declined counseling services suggested by DSS, her request to modify an order of protection to permit communication with her paramour, and the possibility of their future reunification. It is recognized that the most dangerous time in an abusive relationship is when the victim attempts to separate from the abuser. Here, upon being told that he should leave the home, the paramour choked petitioner and stated that "if [she] ended it that he would end it." There was no history of violence prior to the attacks, which occurred on two consecutive days. Petitioner did not have access to a vehicle at first, and, after discussing her plan with family members, and gaining access to a vehicle, petitioner took her two older children to the homes of relatives and brought the youngest child with her to report the incidents.

Petitioner acted reasonably and planned a strategy to report the abuse in such a way as to protect her own safety and that of her children. She and the eldest child sought counseling and advice from their priest, who had some experience assisting families in similar circumstances. DSS did not require counseling services, and petitioner did not act improperly in seeking services from a resource other than that suggested by DSS. Petitioner's request to modify the order of protection to permit discussion of finances and child care with her paramour amounts to no more than undesirable parental behavior, as the paramour was incarcerated and petitioner had not brought the children to visit him. With regard to future reunification with the paramour, there was mere conjecture, and petitioner testified that she would require the paramour's completion of all court-ordered requirements such as anger management and domestic violence awareness classes.

*Matter of Jubilee S.*, 53 Misc.3d 635 (Fam. Ct., Kings Co., 2016)

The Court dismisses neglect charges where one child's out-of-court statement that respondent father hits the mother all over her body has not been adequately corroborated.

Evidence that respondent was in the home in violation of an order of protection does not suggest that there is domestic violence in the home. Respondent's "history" of domestic violence - as reflected in a 2011 family court proceeding and a 2013 criminal court proceeding - also does not provide corroboration. Even if a domestic violence history could be adequate corroboration, there is no evidence that any child's physical, mental, or emotional condition was harmed or placed in imminent risk of harm. And, the child's allegation that she and the other children were "scared" and ran to the bedroom when fights between the parents broke out does not support a finding of substantially diminished psychological or intellectual

functioning.

Although the Court draws the strongest inference that the evidence permits against respondent for his failure to appear and testify, particularly with respect to matters he would be in a position to refute, the strongest negative inference cannot provide a missing element of proof.

*In re Tavene H.*, 139 A.D.3d 633 (1st Dept. 2016)

The First Department upholds findings of neglect where the stepfather committed acts of domestic violence against the mother in the children's presence on one occasion and the mother failed to shield them from the violence, noting, inter alia, that the autistic daughter's out-of-court statement that she cried when she saw the stepfather hit the mother demonstrated that her emotional and physical condition was at imminent risk of harm; the mother told a caseworker that the autistic son did not like it when she and the stepfather argued; the police had responded to the apartment on other occasions due to altercations between respondents; and the mother continued to live with the stepfather despite her awareness of a pending neglect case against him based on his acts of domestic violence against his former partner in the presence of his daughter.

In addition, the mother left the children alone in the apartment on two occasions even though they have a limited ability to communicate and are unable to care for themselves and one child had suffered from recent seizures.

*Matter of A.D.*, 52 Misc.3d 1211(A) (Fam. Ct., Kings Co., 2016)

The Court dismisses at the close of petitioner's case neglect charges brought against the father where the evidence, considered in the light most favorable to petitioner, establishes that on one or more occasions the father yelled at the mother and called her names in the presence of the children; and that the seven-year-old child did not like it when the father did that and covered her and her eighteen-month-old sister's ears to block out the yelling.

For a verbal dispute in the presence of a child to rise to the level of neglect, it would have to be so serious and abusive as to result in provable physical, mental, or emotional harm to the child. Petitioner provided no such evidence.

*Matter of Andre K.*, 142 A.D.3d 1171 (2d Dept. 2016)

The Second Department reverses an order dismissing the petitions, and makes findings of neglect, where the family court credited the mother's testimony and the caseworker's reports regarding the children's accounts of domestic violence, but dismissed the petitions because the court found insufficient evidence that the children's physical, mental, or emotional condition had been impaired or was in danger of becoming impaired.

In the presence of at least one child, respondent threatened that he would kill the mother. On another occasion, he punched the mother in the face when the six older children were in the next room. That blow caused the mother to fall into a bathtub and sustain bruising, which was observed by the six children. During another incident, respondent threw a set of keys at the mother, and the keys hit one of the children in the face while the other older children were present. The incidents caused the six older children to be "afraid," "scared," and "upset."

There was derivative neglect of another child born after the domestic violence incidents.

*Matter of Carolina K.*, 55 Misc.3d 352 (Fam. Ct., Kings Co., 2016) (also addresses use of sealed records of criminal proceeding)

At the fact-finding hearing in this Article Ten proceeding, the Court refused to admit a tape recording of the 911 call that led to respondent father's arrest and prosecution because the criminal case was dismissed and sealed. The Court rejected ACS's argument that the recording was not covered by the sealing requirement in CPL § 160.50(1)(c), which refers to "all official records or papers relating to the arrest or prosecution including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor's office. . . ." Case law has applied the statute to audio

and video recordings.

Upon the fact-finding hearing, the Court dismisses the petition. The incident - there were several differing versions - included a physical altercation involving the two children, the mother and the father. But there is no proof that the children were impaired or in imminent danger of impairment. The fact that a child may express upset or fear of a parent, even for a few days, after a family dispute is not sufficient. Moreover, the children are teenagers, aged 15 and 17 at the time of the incident, and their actions precipitated the incident. Even if the father's response to having both teens and their mother jump on him was excessive given his relative size and strength, that response is not sufficient for a finding of neglect. And, although he may have been under the influence of alcohol at the time, he did not continue to try to gain access to the mother and children after they closed a bedroom door behind them and instead left the house to cool off.

### **Exposure To Sexual Behavior**

*Matter of T.G.*, 53 Misc.3d 362 (Fam. Ct., Kings Co., 2016)

Upon a fact-finding hearing held in the mother's absence, the Court dismisses the neglect petition where an ACS Child Protective Specialist testified that the child reported to her that when she was approximately seven years old and having an overnight visit with her mother, she slept in a bed with her mother and her mother's boyfriend, and that she woke to see her mother taking pictures of the naked boyfriend; and the child's maternal aunt/legal guardian testified that the mother admitted having sex with her boyfriend while the child was in the bed, that the child stated that her mother "was doing nasty things in the bed with her boyfriend" and that her mother showed her pictures of naked men on her phone, and that the child appeared "normal" when she was reporting these things.

ACS established that the mother failed to provide the child with proper supervision and guardianship, but presented no evidence that the child suffered any actual or threatened physical harm or substantially diminished psychological or intellectual functioning. The Court is not free to simply assume or presume that a child's mental or emotional condition has been impaired as a result of the mother's conduct. The strongest inference that the opposing evidence permits may be drawn against the mother, particularly with respect to matters she would be in a position to refute, but that inference cannot provide a missing element of proof.

### **Mental Illness**

*Matter of Ruth Joanna O.O.*, 149 A.D.3d 32 (1st Dept. 2017)

In a 3-2 decision, the First Department upholds a finding of neglect based on the mother's mental illness and her failure to comply with her medication regimen and follow-up treatment, and the fact that her mental illness impaired her ability to care for her infant daughter. No medical expert was needed to determine that the child had been placed at risk. The dissent concedes that the Court has previously found neglect where a parent lacked insight into the effect of the untreated mental illness, even where there is no finding of actual harm to the child.

The mother had multiple delusional episodes, the most serious of which involved her being found on a Texas road in the middle of the night, uttering bizarre statements while her infant daughter was left in the front seat of her vehicle; this led to a one-week hospitalization in Texas where the mother was noncompliant and refused to take medication. Back in New York, the mother maintained an unfounded belief that her daughter had been raped, which led her to bring the child to the hospital where the mother behaved irrationally, was aggressive and threatening, and was then restrained, sedated and hospitalized. While hospitalized, the mother continued to claim that her daughter had been raped, which had caused her to repeatedly check her daughter's rectum and insert a Q-tip inside, and was diagnosed with "psychosis NOS" and "[d]elusional disorder" but continued to refuse necessary medication. The mother sought

approval to cease all medications, and then left the hospital against medical advice when a psychological evaluation was requested. Although the dissent questions whether the rape claim was unfounded, there were no medical records or other evidence substantiating that claim, and the mother also claimed that she was Jesus's wife, and that her three-month-old baby was the devil and was killed and raped by a Free Mason and by her cousin.

Contrary to the dissent's contention, the family court properly conformed the pleadings to the proof (the dissent notes that the family court's sua sponte motion apparently was designed to justify consideration of events occurring after the petition filing date). The mother was afforded due process because she was able to contest the evidence and cross-examine the witnesses at the hearing.

### **Derivative Abuse/Neglect**

*In re Karime R.*, 147 A.D.3d 439 (1st Dept. 2017)

The First Department upholds sexual abuse and derivative abuse findings, concluding that respondent's intent to gain sexual gratification from touching the child's breasts and vagina was properly inferred from the acts themselves, especially given the lack of any other explanation.

The derivative abuse findings are not undermined by the fact that, at the time of the abuse, the youngest child had not yet been born and the middle child was only an infant. Respondent's actions demonstrated that his parental judgment and impulse control were so defective as to create a substantial risk of harm to any child in his care.

*Matter of D.S.*, 147 A.D.3d 856 (2d Dept. 2017)

The Second Department reverses an order dismissing abuse charges, and makes findings of abuse and neglect, where the child testified that respondent, on three occasions, grabbed her buttocks, and, when she looked at him, said "what," and smiled, and that each incident made her feel "uncomfortable." This evidence, together with a negative inference drawn from respondent's failure to testify, was sufficient to support a finding. Intent to gain sexual gratification may be inferred from the nature of the conduct.

However, the family court properly dismissed the petition related to respondent's biological son, who was born shortly after the incident at issue. Respondent's conduct failed to establish that he derivatively abused and/or neglected his son.

*In re Nayomi M.*, 147 A.D.3d 413 (1st Dept. 2017)

The First Department finds sufficient evidence of abuse of the three oldest children, and derivative neglect of the two youngest children, where respondent hit the three oldest children, used pressure points, made them stand on one leg and then kicked that leg out, and locked them in a room for extended periods without access to the bathroom. The two oldest girls also witnessed respondent's more severe abuse of the oldest boy, including his slamming of the boy against the wall and choking him. Medical testimony revealed that the boy's injuries, which included bruises, scratches, black eyes, and black and blue marks on the back of his neck and ears indicative of strangulation, caused a substantial risk of death and at least a substantial risk of protracted impairment of emotional health.

The family court did not err in finding derivative neglect, rather than derivative abuse. There was no evidence that the youngest child, who was a baby, was ever directly exposed to abuse. Although the second youngest child appears to have been locked in the room with the other children, he was only two years old at the time and was apparently not subjected to many of the more severe forms of abuse.

*In re Essence J.*, 144 A.D.3d 593 (1st Dept. 2017)

The First Department upholds findings of neglect and derivative neglect where respondent saw the mother at least three times a week during the period she was drinking to the point of intoxication almost every day, and also failed to complete a sexual rehabilitation program in violation of court orders issued in

connection with a finding that he sexually abused a ten-year-old child approximately thirteen years before these petitions were filed.

The Court also upholds findings of neglect and derivative neglect made via summary judgment with respect to the youngest child where the findings were entered just fifteen days after the youngest child's birth, which was sufficiently close in time to the 2014 proceeding involving the other children.

*Matter of Baby Boy D.*, 144 A.D.3d 1026 (2d Dept. 2016)

In 2011, the mother's 19-month-old son suffered a fractured skull while in the mother's care, and all three of her children were removed from her custody. In July 2012, after a fact-finding hearing, the court made findings of abuse and derivative abuse. In May 2014, the mother gave birth to the subject child. After a fact-finding hearing, the court found that the mother derivatively abused the child.

The Second Department affirms, noting that the mother, who was diagnosed with paranoid personality disorder, failed to re-engage in therapy as directed by an April 2013 dispositional order until shortly before the filing of this petition; that the prior abuse was sufficiently proximate in time to support a reasonable conclusion that the condition still exists; and that the mother stated to a case planner supervisor that "[s]he doesn't believe that she did anything wrong," or "that she'd do anything differently." The mother, who chose not to testify, failed to establish that the condition cannot reasonably be expected to exist currently or in the foreseeable future.

*Matter of Choice I.*, 144 A.D.3d 1448 (3d Dept. 2016)

The Third Department reverses a finding of derivative neglect with respect to a newborn where the evidence regarding a 1999 report that was made against the biological parents and respondent, who was temporarily residing with the biological parents, did not conclusively establish which of the three adults had engaged in the conduct giving rise to the indicated findings; and a 2010 report that was indicated against respondent and his then paramour was based on the children witnessing domestic violence, which does not necessarily constitute neglect.

*Matter of Alexander TT.*, 141 A.D.3d 762 (3d Dept. 2016)

The Third Department upholds a determination, by summary judgment, that respondent father derivatively neglected his two biological children where respondent was convicted of criminal sexual act in the second degree and the transcript of the plea colloquy establishes that respondent admitted to orally sodomizing his 12-year-old stepdaughter and engaging in efforts to pressure her to recant.

*Matter of Ricky S.*, 139 A.D.3d 959 (2d Dept. 2016)

The Second Department concludes that although educational neglect of a school-age child may warrant a finding of derivative neglect with respect to a child younger than school age under the circumstances of the particular case, in this case the truancy of one teenaged child, who resisted going to school, did not establish derivative neglect of the child who was not of school age.

*Matter of Virginia T.F.*, 2017 WL 1024107 (Fam. Ct., Queens Co., 2017)

The Court dismisses derivative neglect charges involving a child (Virginia) born in 2016 that are based on findings made with respect to a child (Robin) born in 2015.

Over a period of many years leading up to Robin's birth, respondent parents neither recognized nor sought help for their drug dependency and mental health issues. However, although their performance in the court-ordered service plan has not been perfect, they have cooperated with it. The mother completed a parenting skills program, was engaged in mental health counseling and drug abuse treatment, and tested negatively for marijuana and alcohol. Virginia was originally paroled to the parents, and, prior to the filing of the amended petition, the father's progress since Robin's birth resulted in Virginia being entrusted to his care after the mother's relapse.

The mother did use marijuana and alcohol during an emotionally charged twenty-four hour relapse. However, she separated herself from the father and Virginia during that time and admitted her wrong

choices to ACS the next morning. Although the father allegedly permitted the mother access to Virginia in violation of a court order, there is no evidence regarding the length of time Virginia was with the mother or the mother's physical or mental condition. A violation of an order of protection does not, by itself, establish neglect.

## **Drug Abuse**

*In re Ja'Vaughn Kiaymonie S.*, 146 A.D.3d 422 (1st Dept. 2017)

The First Department upholds a finding of neglect where the father knew or should have known that the mother was abusing narcotics while she was pregnant with the child, but failed to take any steps to stop her drug use.

*Matter of Steven D.*, 55 Misc.3d 295 (Fam. Ct., Monroe Co., 2016)

At disposition in this neglect case brought against "a drug-addicted admitted prostitute, mother of 4 children, none of whom are in her care," the Court will order the Department of Human Services to direct respondent to: listen to the birth control counseling the county must provide pursuant to SSL § 131-e; see her ob-gyn doctor for whatever confidential advice that doctor may provide regarding birth control, sexually transmitted diseases, and anything else; see her regular medical doctor regarding her health generally, including her addiction; and take whatever steps she chooses (any expense to be borne by the Department) to avoid conceiving another child until she gets the subject child safely back in her care.

In *Matter of Bobbijeane P.*, 2 Misc3d 1011(A), a Monroe County judge issued a supervision order under FCA § 1057 that, inter alia, directed the mother not to conceive more children, but the Fourth Department reversed, concluding that the court had no authority to issue the order. *Matter of Bobbijeane P.*, 46 A.D.3d 12 (4th Dept. 2007), lv denied, 9 N.Y.3d 816. Here, the Court intends to ensure that respondent will get the help she needs to avoid pregnancy, and that, if she does become pregnant again, her unborn fetus will be protected. The Court hopes that if this decision appealed, "the Fourth Department will take note of the change of circumstances that has occurred in our society, particular[ly] regarding heroin use on an unforeseen scale, and acknowledge it was [a] mistake to delete the common sense, no more pregnancies order" in *Bobbijeane P.*

## **Evidence: Expert Testimony**

*Matter of Hadley C.*, 137 A.D.3d 1524 (3d Dept. 2016)

Noting that jurisdiction in abuse and neglect proceedings is governed by the Uniform Child Custody Jurisdiction and Enforcement Act, the Third Department reverses the court's finding of derivative neglect where the child had been living in California with her paternal grandparents for over a year at the time these proceedings were commenced, and thus New York was not her home state.

The Court upholds a finding of neglect as to the other child, noting that a psychologist who performed a sex abuse evaluation opined that, according to the Yuille Step Wise Protocol for interviewing alleged victims of sexual abuse, the child's account "was consistent with the accounts of known sexual abuse victims." This testimony is sufficient to corroborate the child's out-of-court statements

There was no need for proof that respondent touched the child for the purpose of his own sexual gratification or that the child was even awake when it happened, which are not relevant to a determination of whether the conduct placed the child in imminent danger of physical or psychological harm.

*Matter of Dayannie I. M.*, 138 A.D.3d 747 (2d Dept. 2016)

The Second Department concludes that when a child recants allegations of sexual abuse, the family court is not obligated to accept the later statements as true because it is accepted that such a reaction is common among abused children, and thus it simply creates a credibility issue which the court must resolve. Here,

the court did not err in the out-of-court recantation, particularly in light of the expert testimony that it was a false recantation and that the child may have been pressured to recant because respondent was placed in jail after the child's disclosure.

Respondent's sexual abuse, which occurred while other children were present in the home, supported the findings of derivative abuse and neglect.

*Practice Note:* Once again an appellate court has endorsed the admission of expert testimony in an Article Ten proceeding that is not limited to the characteristics of sexually abused children, and instead appears to trespass upon the fact-finder's role in determining whether the child's statements appear to be true or false. *See, e.g., Matter of Jaclyn P.*, 86 N.Y.2d 875 (1995) (court notes that expert concluded that child's descriptions were accurate and reliable); *Matter of Nicholas J.R.*, 83 A.D.3d 1490 (4th Dept. 2011), *lv denied* 17 N.Y.3d 708 (psychologist testified that child's statements were credible); *Matter of Caitlyn U.*, 46 A.D.3d 1144 (3rd Dept. 2007) (therapist opined that child's recantation was false); *Matter of Brandon UU.*, 193 A.D.2d 835 (3rd Dept. 1993) (experts "opined their belief that [child] was being truthful"). A somewhat different signal appears in *Matter of Nikita W.*, 77 A.D.3d 1209 (3rd Dept. 2010) (expert explained that reference to child's "credibility" was "loosely used" and that analysis did not involve credibility determination, only determination as to whether certain elements found in accounts of known sexual abuse victims were present in alleged victim's account).

In other contexts such testimony has been rejected. *See, e.g., People v. Ciaccio*, 47 N.Y.2d 431 (1979) (error where expert testified that witness' version was more credible than defendant's); *People v. Blond*, 96 A.D.3d 1149 (3d Dept. 2012) (court properly precluded defendant from calling social workers to testify that they had conducted statement validity analysis test of victim for use in Family Court, where such testimony is authorized); *Kravitz v. Long Island Medical Center*, 113 A.D.2d 577 (2d Dept. 1985) (it is "questionable at best whether the present state of the art" would permit such testimony).

## **Privileged Communications**

*In re Lawrence C. v. Anthea P.*, 148 A.D.3d 598 (1st Dept. 2017)

In this custody proceeding, the First Department, citing CPLR 4508(a)(1) and *Matter of Rutland v. O'Brien*, 143 A.D.3d 1060 (3d Dept. 2016), concludes that any error was harmless where the court permitted the children's treating psychologist to testify as to confidential matters about the children in the absence of a knowing waiver from the children.

*Matter of Rutland v. O'Brien*, 143 A.D.3d 1060 (3d Dept. 2016)

The Third Department, while upholding an award of custody to the father, does agree with the mother that the family court erred in permitting the father to call the daughter's counselor, a licensed clinical social worker, to testify about confidential, privileged matters in the absence of a knowing waiver from the daughter, notwithstanding the absence of any objection by the attorney for the children.

*Ambac Assurance Corporation, et al. v. Countrywide Home Loans, Inc., et al.*, 27 N.Y.3d 616 (2016)

Generally, communications between an attorney and a client made in the presence of or subsequently disclosed to third parties are not protected by the attorney-client privilege. Under the common interest doctrine, a communication disclosed to a third party remains privileged if the third party shares a common legal interest with the client and the communication is made in furtherance of that common legal interest. In a 4-2 decision, the Court of Appeals now holds that for this exception to apply, the communication must also relate to litigation, either pending or anticipated.

When two or more parties are engaged in or reasonably anticipate litigation in which they share a common legal interest, the threat of mandatory disclosure may chill the parties' exchange of privileged information and thwart any desire to coordinate legal strategy. The same cannot be said of clients who share a common legal interest in a commercial transaction or other common problem but do not reasonably anticipate litigation. The difficulty of defining "common legal interests" outside the context of

litigation could result in the loss of evidence of a wide range of communications between parties who assert common legal interests but who really have only non-legal or exclusively business interests to protect.

## **Right To Call Witnesses**

*In re Lesli R.*, 138 A.D.3d 488 (1st Dept. 2016)

The First Department upholds a determination finding that respondent sexually abused his stepdaughters and derivatively abused his five biological children, noting that his stepdaughters' out-of-court statements that he was inappropriately touching them were sufficiently corroborated by his own out-of-court statements that although he knew his "rough housing" was making them uncomfortable, he continued touching them.

Respondent's intent to gain sexual gratification was properly inferred from his continuing to touch his stepdaughters even after he was told he was making them uncomfortable.

The family court properly granted a motion by the stepdaughters' attorney to quash respondent's subpoena to compel one of them to testify because the letter from the child's psychotherapist and the affidavit from the child's social worker provided evidence of the potential psychological harm from testifying.

*Practice Note:* Some observations regarding the motion to quash the subpoena for the child.

The respondent does have a due process right to confront witnesses in an Article Ten proceeding, and, when the child's out-of-court statements have been admitted, the child effectively has become a witness. However, the respondent's right of confrontation may be limited by the court in appropriate circumstances.

When measuring the respondent's need for the testimony, courts consider not only the respondent's ability to mount a defense in other ways, but also the overall strength of the petitioner's case. The reasoning here is somewhat circular, and goes something like this: the respondent has no demonstrable "need" for the child to testify because there is convincing evidence of guilt and no indication that the child will give favorable testimony. Whatever the merits of this argument might be, appellate courts have found it persuasive. *Matter of Imman H.*, 49 A.D.3d 879 (2d Dept. 2008) (where there was evidence of potential psychological harm from testifying, and child's out-of-court statements were corroborated by testimony of detective and testimony and report of child's psychologist and negative inference was drawn from respondent's failure to testify, court properly granted motion of attorney for child to quash mother's subpoena to compel child to testify); *Matter of Nora M.*, 300 A.D.2d 922 (3rd Dept. 2002) (no error where child who had recanted was not required to testify at hearing upon petitioner's application to extend orders of supervision and protection, since respondent had made sworn admissions); *Matter of Commissioner of Social Services o/b/o Woodley B.*, 207 A.D.2d 885, 616 N.Y.S.2d 646 (2d Dept. 1994) (child not compelled to testify where doctor suggested that stress inherent in requiring child to relive abuse and pressures of being examined would seriously jeopardize fragile emotional condition, and child's out-of-court statements were consistent, medical records corroborated child's allegations, and respondent made admission).

The respondent may not interview the child without the permission of the attorney for the child. See *Matter of Awan v. Awan*, 75 A.D.3d 597 (2d Dept. 2010) (court properly struck testimony of father's expert and precluded further testimony by expert because father's attorney violated Rule 4.2 by allowing expert to interview and examine child and prepare report without knowledge or consent of attorney for child); *Matter of Brian R.*, 48 A.D.3d 575 (2d Dept. 2008) (attorney for father disqualified where he communicated with one child, and used her as interpreter when speaking with parties, without knowledge and consent of child's lawyer); *Matter of Marvin Q.*, 45 A.D.3d 852 (2d Dept. 2007) (respondent's attorney properly disqualified where attorney violated child's due process rights by allowing members of firm to interview child, and procuring affidavit from child regarding pending proceedings, without consent of child's lawyer, and court properly precluded use of affidavit); *Campolongo v. Campolongo*, 2

A.D.3d 476 (2d Dept. 2003) (where defendant's counsel caused defendant to retain psychiatrist to interview child and prepare report without knowledge of child's lawyer, counsel was properly disqualified and psychiatrist's report and testimony were properly precluded).

Without an opportunity to conduct such an interview, the respondent would be taking a risk in calling the child. Also, the child is the respondent's own witness. Thus, the respondent's attorney would be conducting a direct examination and could not ask leading questions. For the same reason, the respondent's attorney could not ask the child about prior inconsistent statements that were not made in writing or under oath, or otherwise impeach the child. Richardson on Evidence, § 6-419; CPLR 4514 ("In addition to impeachment in the manner permitted by common law, any party may introduce proof that any witness has made a prior statement inconsistent with his testimony if the statement was made in a writing subscribed by him or was made under oath").

On the other hand, it is true that a certain amount of leading is permitted when needed to elicit the testimony of a young child. *See, e.g., In re Christopher T.*, 71 A.D.3d 464 (1st Dept. 2010) (given age of the victim and sexual nature of charges, presentment agency needed to use leading questions to draw out facts); *People v. Cuttler*, 270 A.D.2d 654 (3rd Dept. 2000) (no error where prosecutor was allowed to lead child victim in sexual abuse case). In addition, the respondent could ask that the child be declared a hostile witness. A witness's legally cognizable "hostility," which permits the use of leading questions and impeachment of the witness, may arise out of a witness' interest in the case, or a witness' demonstrated reluctance to testify on the stand. *See, e.g., People v. Dann*, 14 A.D.3d 795 (3d Dept. 2005) (defendant's girlfriend declared hostile where she attempted to evade questions, was unable to recall facts she had testified to on several prior occasions, and was generally uncooperative). The attorney for the child would be on firm ground in arguing that a child who, given the familial connection to the respondent, would be expected to possess a natural reluctance to disclose abuse or neglect, cannot be deemed a hostile witness.

### **Out-of-Court Statements Of Children And Other Hearsay**

*Matter of Kaliia F.*, 148 A.D.3d 805 (2d Dept. 2017)

The Second Department holds that although a child's statements regarding abuse or neglect may be admissible under FCA § 1046(a)(vi) even when the child is not the subject of the proceeding, such statements are not admissible unless the respondent is a parent or other person legally responsible for the child's care who could be charged with abuse or neglect of that child.

*Matter of A.F.* (Fam. Ct., Kings Co., 12/5/16)

(unpublished decision, contact Gary Solomon for copy)

In this sexual abuse proceeding, the Court holds that the incomplete testimony of the child from a FCA § 1028 hearing, which was stricken at the § 1028 hearing after the child declined to continue testifying in the middle of respondent's cross-examination, may be admitted at the fact-finding hearing pursuant to FCA § 1046(a)(vi) as a previous statement of the child.

The Court notes, inter alia, that statements made after the filing of the petition are admissible; that an in-court statement made under oath is likely more reliable than an out-of-court statement, and in any event the Court had an opportunity to assess the child's credibility; and that the child's statements were subjected to extensive cross-examination.

*Matter of Colby II.*, 145 A.D.3d 1271 (3d Dept. 2016)

In this abandonment proceeding, the Third Department finds reversible error where the parties stipulated that the child had contact with respondent through Facebook, and that the child was the sender of Facebook messages transmitted under his name, but the court found that respondent did not establish a foundation for the admission into evidence of a print-out of the Facebook messages, and precluded her testimony regarding the frequency of her communications with the child via Facebook via her adult son's account.

Respondent testified that she was present when her counsel printed the Facebook messages at his office, and that she reviewed the entire document to ensure that it was a full and complete copy. The parties' stipulation and respondent's testimony, when combined with her adult son's testimony confirming that he had provided respondent with his account information, password and permission to use the account for communication with the child, constituted a sufficient foundation for the admission into evidence of the printed messages and respondent's related testimony.

The court deprived respondent of her due process right to a full and fair opportunity to be heard.

*In re Dhanmatie G. v. Zamin B.*, 146 A.D.3d 495 (1st Dept. 2017)

In a family offense proceeding in which petitioner's allegations that respondent uncle inappropriately touched one or more of the children were supported only by the inadmissible hearsay statements of the children, the First Department holds that FCA § 1046(a)(vi) does not apply. That statute applies only in FCA Article Ten and Ten-A proceedings, and in FCA Article Six custody proceedings founded upon abuse or neglect, in which custody and abuse or neglect issues are inextricably interwoven.

### **Right Of Confrontation**

*Matter of Hannah T.R.*, 2017 WL 1394007 (2d Dept. 2017)

In this Article Ten proceeding, the Second Department finds no abuse of discretion or due process violation where the family court properly weighed the respective rights and interests of the mother and the child before permitting the child to testify via a two-way closed-circuit television arrangement. The mother, appearing pro se, was permitted to be present during the televised testimony and to cross-examine the child.

*Matter of Emily R.*, 140 A.D.3d 1074 (2d Dept. 2016)

In this FCA Article Ten proceeding, the Second Department finds no abuse of discretion where the family court permitted one of the children to testify from a position within the courtroom from which she could be heard but not seen, while the father and his attorney were present in the courtroom. The court properly balanced the father's right to due process with interests in the emotional health of the child.

*Practice Note:* It appears that where, as here and in cases in which a child testifies via closed circuit television, the respondent can see and/or hear the child's live testimony, the courts are quicker to endorse the procedure than in cases in which the respondent is excluded from the courtroom and has no opportunity to see and/or hear the live testimony.

*Matter of Desirea F.*, 137 A.D.3d 1519 (3d Dept. 2016)

The Third Department, dismissing the appeals as moot, notes that although a respondent does not have an absolute right to be present at the court's age-appropriate consultation with the child at a permanency hearing, the court must expressly balance the interests of the respondent in being present against the impact that the respondent's presence would have on the mental and emotional well-being of the child.

Here, the attorney for the children informed the court that the children wished to speak with the court outside of respondent's presence. Over respondent's objection, and without engaging in the required balancing on the record, the court conducted the consultation with only the attorney for the children present and improperly excluded respondent. Furthermore, the court erred in advising the children that the statements they made during the consultation would remain confidential.

### **Dismissal Because Aid Of Court Not Required**

*Matter of Kailynn I.*, 52 Misc.3d 740 (Fam. Ct., Kings Co., 2016)

In this Article Ten proceeding, respondent mother moves for dismissal of the petition via summary judgment on the grounds that she did not neglect the children and that the aid of the court is not required.

With respect to the neglect charges, ACS argues that, even if there is no factual dispute as to whether Kailynn sustained her head injury by falling off the bed as respondent describes, respondent's act of leaving the child alone on the bed while she went to the bathroom is a sufficient basis for a finding of neglect. ACS also contends that there is an issue of fact as to whether respondent failed to take Kailynn to the doctor for several days because she did not believe it was medically necessary or because she feared losing her job.

The Court denies the summary judgment motion, concluding that although it would grant the motion were respondent charged only with leaving Kailynn on the bed briefly (and progress notes indicate that respondent put pillows around Kailynn on the bed and was only going down the hall briefly to use the bathroom), there are factual issues regarding respondent's decision not to take Kailynn to the doctor for four days following her fall.

However, the Court dismisses the petition on the ground that the aid of the court is not required. The Court does not agree with ACS that appellate case law interpreting FCA § 1051(c) precludes dismissal prior to a fact-finding hearing. The Second Department's statement in *Jonathan M.* (306 A.D.2d 413) - "only at the conclusion of a fact-finding hearing can the Family Court dismiss the petitions upon a determination that its aid is not required on the record before it" - appears to be dicta, and the Court does not believe the Second Department intended *Jonathan M.* to prevent a dismissal where "the record" required by the statute does exist prior to a fact-finding hearing. Also, the heading of FCA § 1051 is "sustaining or dismissing a petition," not "orders after fact-finding hearing," and § 1051(c) refers to the "record before" the Court, not the record at the fact-finding hearing or the evidence at trial. And, in *Angel R.* (285 A.D.2d 407), the First Department did not condone dismissal because of the petitioner's lack of readiness to proceed at the fact-finding hearing, but did find dismissal to be proper because the court's aid was not required given that the two older children were living in Puerto Rico with their grandmother and the youngest child was already under the petitioner's supervision.

Here, respondent has actively participated in services and will soon complete her parenting class, and there are no ongoing safety concerns.

*Matter of Zeykis B.*, 137 A.D.3d 1121 (2d Dept. 2016)

The Second Department finds error where the family court, after making a neglect finding based on domestic violence, dismissed the petition on the ground that the aid of the court was not required.

Respondent's relocation to Georgia was not a basis for dismissal. He is the biological father of one of the children and could return to New York at any time. The children are minors, and the finding could be significant in a future court proceeding. The court's conclusion that it could not issue a meaningful dispositional order was not a valid basis for dismissal under FCA § 1051(c), and in any event was incorrect as a matter of law.

*Practice Note:* FCA § 1051(a) requires that the court make a finding of neglect when sufficient facts have been established. FCA § 1051(c) states that "if facts sufficient to sustain the petition ... are not established, or if, in a case of alleged neglect, the court concludes that its aid is not required on the record before it, the court shall dismiss the petition and shall state on the record the grounds for the dismissal." There has been some controversy with respect to whether § 1051(c) authorizes an "aid of the court is not required" dismissal after a neglect finding has been entered, or, instead, only as an alternative to a finding. Here, as it did in *Matter of Anoushka G.*, 132 A.D.3d 867, the Second Department ruled upon a dismissal order issued post-fact-finding, and did so without suggesting that the family court had no authority as a matter of law to issue such an order. In effect, the Second Department has recognized a dispositional alternative, akin to an order dismissing the petition in the interests of justice, that is not mentioned in FCA § 1052.

## **Disposition/Permanency Proceedings**

*In re M.M.*, 2016 WL 7007716 (Ill. 2016)

In this neglect proceeding, the court found that the father, with whom the children were residing when the petition was filed, was responsible for neglect, but that the noncustodial mother was not. At disposition, the court found the father to be unfit, but, although the court found that the mother was fit and there was no indication that she was unable or unwilling to care for the children, placed the children in the custody of the Department of Children and Family Services.

An appellate court reversed, concluding that it was error to place the children in the absence of a finding of unfitness or a finding that the mother was unable or unwilling to care for the children, and that a mere finding that placement with a third party might be in a child's best interest is insufficient to supersede a fit parent's superior right to custody.

The Illinois Supreme Court affirms. Even where a best interest standard permeates and governs the dispositional hearing, placement with a third party requires the prerequisite consideration of parental fitness. To construe the statute differently would run afoul of the Supreme Court's decision in *Troxel v. Granville* (530 U.S. 57).

*Practice Note:* While there is no Court of Appeals decision as definitive as the Illinois Supreme Court's decision, New York case law is consistent with the Illinois decision. *See Matter of Michael B.*, 80 N.Y.2d 299 (1992); *Matter of John KK.*, 302 A.D.2d 811 (3rd Dept. 2003); *In re Dwayne McM.*, 289 A.D.2d 29 (1st Dept. 2001); *Matter of Commissioner of Social Services o/b/o Tyrique P.*, 216 A.D.2d 387 (2d Dept. 1995); *Matter of Alfredo S.*, 172 A.D.2d 528 (2d Dept. 1991), *appeal dismissed* 78 N.Y.2d 899.

*Matter of Jamie J.*, 145 A.D.3d 127 (4th Dept. 2016) (appeal to be heard in Court of Appeals)

On November 10, 2014, the Family Court directed the temporary removal of the one-week-old child from the mother's care pursuant to FCA § 1022, and petitioner then commenced an Article Ten neglect proceeding. Subsequently, the court granted petitioner's application for continued placement at a permanency hearing. More than one year after the petition was filed, at a fact-finding hearing, the court, after ruling that post-filing events were not relevant, denied petitioner's application to amend the petition to conform the pleadings to the proof and dismissed the petition on the ground that there was insufficient proof that the mother neglected the child during the one week the child was in her care. Petitioner did not appeal from that order.

The mother then moved to dismiss the permanency petition and vacate the FCA § 1022 order. The court denied the motion. After petitioner presented evidence at the next permanency hearing, the mother consented to an order continuing placement on the ground that the best interests and safety of the child would be served because the child would be at risk of neglect if returned to the mother. She reserved her right to challenge the court's exercise of subject matter jurisdiction after the neglect petition had been dismissed.

In a 3-2 decision, the Fourth Department holds that the Family Court retains subject matter jurisdiction to conduct a permanency hearing where, as here, the Article Ten petition has been dismissed. Family Court Act § 1088 provides that "the court shall maintain jurisdiction over the case until the child is discharged from placement," and no provision in Article Ten-A provides for a termination of placement when a neglect or abuse petition is dismissed. Were the Court to review the mother's unpreserved contention that her substantive due process rights were violated by continued placement in the absence of a finding of neglect, it would conclude that her rights were protected by the requirement that the Family Court determine, following the permanency hearing, whether the child would be at risk of abuse or neglect if returned to the mother [see FCA § 1089(d)(1)], and the evidence that established such a risk.

The dissenting judges assert that the enactment of Article Ten-A did not abrogate settled law and extend the subject matter jurisdiction of the Family Court beyond the dismissal of the neglect petition. The language of FCA § 1088, considered in isolation, appears to confer continuing jurisdiction regardless of the outcome of the underlying Article Ten proceeding, but giving effect to the statute's plain language requires the Court to interpret the statute in a manner that renders it unconstitutional. The majority effectively sanctions the use of the temporary order issued in an ex parte FCA § 1022 proceeding as the

jurisdictional predicate for petitioner's ongoing, open-ended intervention in the parent-child relationship after the neglect petition was dismissed on the merits. The court's exercise of jurisdiction pursuant to Article Ten-A resulted in the violation of the mother's fundamental right to raise her child.

*Practice Note:* The majority's decision raises so many questions and concerns that it is difficult to know where to begin.

In the typical scenario, after the Family Court denied petitioner's motion to amend the pleadings to conform to the proof, petitioner would have filed a new Article Ten petition alleging neglect that took place after the child came into foster care. Why did petitioner not do that in this case? Was petitioner not confident in its ability to prove such a case? Why did petitioner not appeal on the ground that the denial of the motion to amend the pleadings was error? The case law is quite liberal in allowing amendments to conform to the proof. Why did petitioner choose instead to resort to the rather bold argument the majority bought into? Did the majority have an agenda? Did it want to ensure that there is interim authority for a continuation of placement post-dismissal while a petitioner prepares a new petition? But there is an automatic stay that keeps a child in foster care post-dismissal until 5 p.m. the next business day [FCA § 1112(b)], and, if there is a cause of action, why should it take a petitioner more than a day or two to initiate a new proceeding? In this scenario, what happens to the imminent risk standard that usually governs removal pre-fact-finding? It appears that standard is trumped by the standard in FCA § 1089(d)(1). So a respondent whose case has been dismissed after a fact-finding hearing now has less protection than a respondent whose case is pre-fact-finding? For how long can a foster care placement continue in the absence of an Article Ten fact-finding? Indefinitely? Does the majority think the risk of neglect or abuse standard in FCA § 1089(d)(1) requires proof that would satisfy the definitions in FCA § 1012(e) and (f)? Since hearsay is admissible at a permanency hearing - it would not be at an Article Ten or Article Six custody hearing - why was the majority satisfied that § 1089(d)(1) provides a parent with due process?

Does it become clear that the dissenting judges have the better argument? Because, with the two-judge dissent, there is an automatic right to appeal (CPLR § 5601), the Court of Appeals may someday answer that question.

A salutary element of the majority's decision was the reminder that the Family Court was required to determine at the permanency hearing whether the child would be at risk of abuse or neglect if returned to the mother. In a custody contest between a parent and a nonparent or the State, the child's "best interests" are not analyzed until after extraordinary circumstances have been established. Similarly, "best interests" cannot automatically be the standard even after a finding of neglect or abuse has been made. In some cases the initial parental neglect or abuse, and any neglect while the child is in foster care, will justify continued placement, and in other cases it will not. *See, e.g., Matter of Natasha RR.*, 42 A.D.3d 762 (3rd Dept. 2007), *appeal dismissed* 9 N.Y.3d 812 (order extending placement reversed where respondents had intellectual limitations, but were fully cooperative with agency and made significant efforts to avail themselves of services, programs and assistance; court's decision was premised, in significant part, upon finding that parents were "incapable of independently providing proper and adequate care for the child," but parent "does not have to function in a totally independent fashion to be reunited with a child"); *Matter of Sunshine Allah Y.*, 88 A.D.2d 662, 450 N.Y.S.2d 520 (2d Dept. 1982) (extension properly denied where petitioner failed to show mother's present inability to care for child and that continued placement was in child's best interest).

*Matter of Demetria FF.*, 140 A.D.3d 1388 (3d Dept. 2016)

At a permanency hearing, the court denied the maternal uncle's motion seeking permission to intervene pursuant to FCA § 1035(f), concluding that the uncle was no longer entitled to intervene because the fact-finding and dispositional hearings had already transpired. The uncle was also seeking Article Six custody. The Third Department reverses. Section 1035(f) does not limit the right of intervention to only the fact-finding and dispositional hearings held in the Article Ten proceeding. Rather, it broadly permits a qualified relative seeking temporary or permanent custody of the child to participate "in all phases of dispositional proceedings." A permanency hearing is plainly dispositional in nature and thus constitutes a

“phase” of dispositional proceedings for purposes of § 1035(f).

### **Custody: Hearing Requirement**

*S.L. v. J.R.*, 27 N.Y.3d 558 (2016)

The Court of Appeals finds reversible error where the supreme court made a final custody determination without first conducting a plenary hearing.

Custody determinations should generally be made only after a full and plenary hearing. This rule furthers the substantial interest in ensuring that custody proceedings generate a just and enduring result that serves the best interest of a child. Whenever possible, custody should be established on a long-term basis and children should not be shuttled back and forth between divorced parents merely because of changed circumstances so long as the custodial parent has not been shown to be unfit. Custody determinations require a careful and comprehensive evaluation of the material facts and circumstances. The value of a plenary hearing is particularly pronounced in custody cases given the subjective factors - such as the credibility and sincerity of the witnesses, and the character and temperament of the parents - that are often critical to the court’s determination. Of course, given that the guiding principle is the best interest of the child, there can be no absolutes in child custody cases.

Here, the Appellate Division affirmed based on its determination that the court possessed “adequate relevant information to enable it to make an informed and provident determination as to the child’s best interest.” However, the undefined and imprecise “adequate relevant information” standard “tolerates an unacceptably-high risk of yielding custody determinations that do not conform to the best interest of a child,” and does not adequately protect a parent whose fundamental right hangs in the balance. The supreme court appeared to rely on, among other things, hearsay statements and the conclusion of a court-appointed forensic evaluator whose opinions and credibility were untested by either party. A decision regarding child custody should be based on admissible evidence, not mere “information;” while the supreme court purported to rely on allegations that were “not controverted,” the mother’s affidavit called into question or sought to explain the circumstances surrounding alleged “incidents of disturbing behavior.”

These circumstances do not fit within the narrow exception to the general right to a hearing. Where, as here, facts material to the best interest analysis, and the circumstances surrounding such facts, remain in dispute, a custody hearing is required, and a court opting to forego a plenary hearing must take care to clearly articulate which factors were or were not material to its determination and the evidence supporting its decision.

### **Standing To File**

*Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016)

In *Matter of Alison D. v Virginia M.*, 77 N.Y.2d 651 (1991), the Court of Appeals held that, in an unmarried couple, a partner without a biological or adoptive relation to a child is not that child’s “parent” for purposes of standing to seek custody or visitation under Domestic Relations Law § 70(a), notwithstanding the partner’s established relationship with the child.

The Court now overrules *Alison D.*, concluding that the definition of “parent” established 25 years ago in *Alison D.* “has become unworkable when applied to increasingly varied familial relationships.”

Long before *Alison D.*, New York courts exercised their inherent equity powers in order to determine who is a parent and what will serve a child’s best interest. Domestic Relations Law § 70 has never mentioned, much less purported to limit, those equitable powers, and courts have continued to employ principles of equity to grant custody, visitation or related extra-statutory relief. In *Alison D.*, the Court departed from this tradition of invoking equity by narrowly defining the term “parent,” and thereby foreclosing all inquiry into the child’s best interest. That rule has inflicted disproportionate hardship on the growing

number of nontraditional families across our State. Legal commentators have taken issue with *Alison D.* for its negative impact on children, and a growing body of social science reveals the trauma children suffer as a result of separation from a primary attachment figure, such as a de facto parent, regardless of that figure's biological or adoptive ties to the children.

Any encroachment on the fundamental rights of biological and adoptive parents, and any expanded test to define who is a parent, must be appropriately narrow. The Court declines to adopt a test that is appropriate for all situations. Here, petitioners have alleged that the parties entered into a pre-conception agreement to conceive and raise a child as co-parents. These allegations, if proven by clear and convincing evidence, are sufficient to establish standing to seek visitation and custody under Domestic Relations Law § 70. The Court does not now decide whether an unmarried partner can establish standing where, after conception, a biological or adoptive parent consented to the creation of a parent-like relationship.

Now that *Alison D.* does not preclude standing, *Brooke B.* is remitted for consideration of standing by equitable estoppel. In *Estrellita A.*, the courts below correctly recognized petitioner's standing based on judicial estoppel where, in a child support proceeding, respondent obtained an order based on her argument that petitioner was a parent to the child.

Judge Pigott, concurring, would not overrule *Alison D.* and leave it to the Legislature to amend the statute if it wishes, but, noting that The Marriage Equality Act did not benefit the same-sex couples involved in these appeals, finds extraordinary circumstances that give petitioners standing to seek visitation. Each couple agreed to conceive a child by artificial insemination at a time when they were not allowed to marry in New York and intended to raise the child in the type of relationship the couples would have formalized by marriage had our State permitted them to exercise that fundamental human right.

*Matter of Beverly L. v. James H.*, 53 Misc.3d 415 (Fam. Ct., Monroe Co., 2016)

In this custody proceeding, the biological mother, who previously executed a conditional surrender and reserved the right to visit the children and has done so consistently, alleged sexual abuse of one child by the adoptive father and of another child by an unrelated third-party, and also alleged that her son was the target of bullying in the adoptive home. The adoptive mother moved to dismiss the petition for lack of standing.

The Court granted the motion. Whether or not a showing of extraordinary circumstances is sufficient to overcome an adoption must be determined on a case by case basis. A biological parent might achieve standing if he/she is found fit to parent, and the adoptive parent's own rights are terminated or surrendered or he/she becomes unavailable due to incarceration, illness, disability or death.

Here, the adoptive mother wants to keep her family intact. She contends she has taken steps to divorce her husband, who is incarcerated. She and the children are attending counseling. The children want to spend more time with their biological mother, but want to live with their adoptive mother. Thus, although the biological mother has maintained a close relationship with the children, and the adoptive family is in crisis, the biological mother does not have standing based upon extraordinary circumstances.

*Elizabeth L. v. Jaris S. et al.*, 52 Misc.3d 777 (Fam. Ct., Kings Co., 2016)

The Court, rejecting the agency's arguments, holds that the children's great-aunt, their former foster parent from whose home the agency removed the children because the great-aunt allegedly assaulted her boyfriend in the children's presence, has standing to seek FCA Article Six custody of the children.

The Court notes that, in general, non-parents have a right to seek custody via a showing of extraordinary circumstances, which exist in this case because there has been a finding that the mother permanently neglected the children; that the great-aunt unquestionably would have had standing had she never become a foster parent, and relatives cannot be asked to make the untenable choice to accept a foster care per diem in exchange for waiving their standing to pursue custody later; that the Family Court Act provides a mechanism for relatives to file for custody or guardianship of a child in foster care, with the court terminating an ongoing Article Ten proceeding by granting a final order on the Article Six petition, and there is no exception in the statute for a kinship foster parent; that a relative can take advantage of the subsidized kinship guardianship program, which could not exist if foster parents lacked standing; and that

once an agency closes a kinship foster home and that determination is upheld, the court that required the agency to place the child in that home could never issue a custody or guardianship order that is in the children's best interest if the agency's position is accepted.

The Court also concludes that it would be inequitable for the great-aunt to be denied the opportunity to maintain some relationship with the children through a temporary order of visitation. Otherwise, the agency, which opposes her custody application, could influence the outcome of the trial by preventing her from maintaining contact with the children before the court hears all the evidence, including evidence of the bond between the children and their great-aunt.

*Matter of Castellanos v. Recarte*, 142 A.D.3d 552 (2d Dept. 2016)

The mother filed a custody petition seeking sole custody of her two children, then ages 15 and 12, alleging that after the father died in 2004, she and the children moved from Honduras to the United States in 2014, and the children were pursuing special immigrant juvenile status as a means to obtain lawful permanent residency status in the United States. Her petition was unopposed, but the family court dismissed the petition on the ground that it was unnecessary since she already had custody by operation of law.

The Second Department reverses and remits the matter to the family court. Although the mother was presumptively entitled to custody, she still has standing to seek legal custody.

*Matter of Cade v. Roberts*, 141 A.D.3d 583 (2d Dept. 2016)

Petitioner, who has no family relationship to the child, moved in with the great-grandmother to help care for the child shortly after the child's birth, and, in November 2006, moved out of the great-grandmother's home and back to her own residence with the child. In 2008, the great-grandmother transferred custody to respondent maternal grandfather, and, after he was imprisoned in June 2009, his wife, respondent step-grandmother, was, along with the grandfather, awarded joint legal custody and residential custody. However, petitioner continued to keep the child overnight at her residence even after the grandfather and step-grandmother obtained custody. In April 2012, the step-grandmother decided that petitioner's services were no longer necessary, and petitioner then sought custody.

The Second Department reverses an order that, after a hearing, dismissed the custody petition for lack of standing, and orders a best interests hearing. Petitioner proved extraordinary circumstances, which included, inter alia, the prolonged separation of the grandfather and the step-grandmother from the child, their lack of significant involvement in the child's life for a period of time, their failure to contribute to the child's financial support, and the strong emotional bond between the child and petitioner.

## **Appeals: Mootness**

*In re Patricia A.*, 140 A.D.3d 618 (1st Dept. 2016)

The First Department, concluding initially that the appeal is not moot, upholds the family court's determination that the permanency goal of adoption was in the children's best interest.

*Practice Note:* Regarding the mootness issue, the First Department cited *Matter of Jacelyn TT.* (80 A.D.3d 1119), where the Third Department held that while subsequent permanency orders will effectively supersede the orders appealed from, the family court, by modifying the permanency goal, altered petitioner's obligations from working toward reunification to working toward permanent placement and termination of parental rights, and thus any new permanency orders were a direct result of the orders appealed from and the propriety of those orders was still an issue that affected the father's rights.

*Matter of Iyanna KK.*, 141 A.D.3d 885 (3d Dept. 2016)

In this termination of parental rights proceeding, the Third Department, noting that the adoption of the children has rendered respondent's appeal from the dispositional order moot, concludes that although the adoption would not have rendered moot a challenge to the finding of permanent neglect, respondent

abandoned such a challenge by failing to address that issue in his brief.

*Practice Note:* Under 18 NYCRR § 421.19(i)(5)(i), “[i]f the order committing custody and guardianship is appealed, the [adoption] petition may not be filed until after the appeal is finally resolved and then only if the order of commitment remains in place.” If this regulation is violated and an adoption petition is filed, a parent who has taken an appeal from the termination order is well-advised to seek a stay of adoption proceeding.

In any event, the New York rule providing that a challenge to a dispositional order terminating parental rights is rendered moot by an adoption (see also *In re Alexis C.*, 99 A.D.3d 542 [1st Dept. 2012], *lv denied* 20 N.Y.3d 856), but an appeal from the underlying fact-finding is not, effectively leaves the parent with a means of obtaining an appellate ruling that will nullify the order terminating parental rights by reversing the underlying fact-finding order. At that point, the parent could make a motion to vacate the adoption pursuant to CPLR 5015(a)(5) (motion upon ground of “reversal, modification or vacatur of a prior judgment or order upon which it is based”). Relief under CPLR 5015 is discretionary, and a parent’s failure to at least seek a stay of adoption proceedings surely would be taken into account by a judge.

Other states have grappled with these issues, with conflicting results. In *In re Tekela*, 780 N.E.2d 304 (Ill. 2002), the Illinois Supreme Court held that the filing of a notice of appeal does not act as a stay of an order terminating parental rights, and that after the passage of the one-year period within which an adoption order may be challenged in Illinois, any challenge to the validity of a termination order would be rendered moot since an appellate ruling could have no practical effect on the controversy or the parties’ rights. In other words, a reversal of the order terminating parental rights, and the resulting restoration of parental rights, would not render the adoption order invalid. The court noted that the parent is responsible for preserving the opportunity to obtain appropriate relief by seeking a stay of the termination order, and that the failure to obtain a stay precipitates the chain of events that permits adoption proceedings to continue lawfully and creates the mootness problem. A dissenting judge asserted that the State will be tempted to delay appeals as long as possible; that, for all practical purposes, the propriety of termination orders will no longer be reviewable; and that since stays are a matter for the court’s discretion, the majority was placing a parent’s fundamental rights at the mercy of a judge’s subjective view of fairness.

In contrast, in *In re JK v. Kucharski*, 661 N.W.2d 216 (Mich. 2003), the Supreme Court of Michigan held that an adoption may not go forward before appeals have been exhausted, while noting that “[p]arents whose rights have been terminated by the trial court are entitled to appellate review of this decision without that review being compromised by the specter of appellate courts having to undo an adoption as a concomitant act to the granting of relief for those parents. Such a result is simply contrary to the structure of the justice system established by our constitution and laws.” And, in *In re Adoption of P.A.C.*, 933 N.E.2d 236 (Ohio 2010), where paternity proceedings were pending at the same time as an adoption proceeding, a Ohio Supreme Court majority held that when an issue concerning the parenting of a minor is pending in the juvenile court, a probate court must refrain from proceeding with the adoption of that child, and the determination of a parent-child relationship in the juvenile court proceeding must be given effect in the stayed adoption proceeding.

## **II. Attorney For The Child Practice Under Rule 7.2**

### **Child’s Capacity To Make Decisions**

*Matter of Shaw v. Bice*, 117 A.D.3d 1576 (4th Dept. 2014), *lv denied*, 24 N.Y.3d 902 (no AFC conflict where son expressed desire to reside with mother, which was not consistent with daughter’s expressed wishes, but AFC advised court that son, age nine, wanted to live with mother because at her house “he can stay up late and he doesn’t get in trouble,” and, in AFC’s view, son’s position was “immature and thus not controlling” upon AFC)

*Matter of Eastman v. Eastman*, 118 A.D.3d 1342 (4th Dept. 2014), *lv denied* 24 N.Y.3d 910 (mother's contention that AFC improperly substituted judgment unpreserved because mother did not move to remove AFC; in any event, child, seven years old at conclusion of hearing and functioning at kindergarten level, lacked capacity for knowing, voluntary and considered judgment)

*Venecia V. v. August V.*, 113 A.D.3d 122 (1st Dept. 2013) (no prima facie showing of legal malpractice and disciplinary violations where father contended that AFC "ignored abundant evidence that her clients' judgment was not voluntary and in fact was manipulated by their mother" and ignored forensic expert's findings and other evidence of alienation, but there was no evidence that children lacked requisite capacity)

*Matter of Rosso v. Gerouw-Rosso*, 79 A.D.3d 1726 (4th Dept. 2010) (no error where AFC determined that approximately nine-year-old child lacked capacity for knowing, voluntary and considered judgment)

*Matter of Gregory S. v. Dana K.*, 52 Misc.3d 1211(A) (Fam. Ct., Erie Co., 2016) (where mother had not complied with visitation orders, attorney for children (ages 17, 12 and 12) communicated children's desire to spend no time with father, but opined that the children were no longer capable of knowing and considered judgment and substituted judgment)

### **Imminent Serious Harm Exception**

*Matter of Emmanuel J.*, 2017 WL 1347917 (3d Dept. 2017) (attorney for children did not err in substituting judgment for two children, ages approximately seven and ten, who wanted to stay in home with deplorable conditions, where respondent neglected other child who had sleep apnea and hypoxemia which required use of apnea monitor and oxygen therapy while she sleeps, and one of the two children in question missed school because she repeatedly had head lice; was sent to school dressed inappropriately for the weather and smelling of urine or body odor, and would often cry when the issue of her hygiene was raised and stated that she was not supposed to visit the nurse's office and worried that she would get in trouble with respondent and her mother for doing so; suffered from urinary incontinence and frequent urinary tract infections and had, on more than one occasion, been locked in her bedroom overnight and thus forced to urinate on the mattress where she slept, and the resulting mess would not be cleaned; and displayed a marked improvement in demeanor, confidence and academic performance when she was in petitioner's care)

*Matter of Zakariah SS. v. Tara TT.*, 143 A.D.3d 1103 (3d Dept. 2016) (in case involving mother's ongoing attempts to alienate child (born in 2004) from father, Third Department finds no error in AFC's decision to advocate position contrary to child's wishes, of which court was aware, given that such wishes were likely to result in substantial risk of imminent, serious harm)

*Matter of Brian S.*, 141 A.D.3d 1145 (4th Dept. 2016) children deprived of effective assistance of counsel where, when mother moved to dismiss petition at close of petitioner's case, AFC opposed motion, and AFC also asked questions designed to elicit unfavorable testimony regarding mother from petitioner's witness, which undercut children's position; because the children were teenagers, there was no basis for conclusion that they lacked capacity for knowing, voluntary and considered judgment, and there was no evidence that following children's wishes was "likely to result in a substantial risk of imminent, serious harm" where the children frequently skipped school, the mother may have occasionally used drugs in the house and thus been unable to care for the children, and mother may have struck third child on arm with belt on one occasion, leaving small mark)

*Matter of Isabella A.*, 136 A.D.3d 1317 (4th Dept. 2016) (child, who was five and six years old at time of proceedings, lacked capacity for knowing, voluntary and considered judgment, and following child's

wishes was likely to result in substantial risk of imminent, serious harm to child where, if AFC had successfully advocated for child's wishes, it would have been tantamount to severing her relationship with her father)

*Matter of Viscuso v. Viscuso*, 129 A.D.3d 1679 (4th Dept. 2015) (AFC properly advocated for result contrary to child's expressed wishes where following child's wishes would be tantamount to severing her relationship with her father, and mother's persistent and pervasive pattern of alienating child from father was likely to result in substantial risk of imminent, serious harm to child)

*Matter of Lopez v. Lugo*, 115 A.D.3d 1237 (4th Dept. 2014) (AFCs properly advocated contrary to clients' wishes where mother had been arrested for possession of drugs in children's presence, numerous weapons had been seized from mother's house, and mother's husband had assaulted child who had attempted to intervene when husband attacked mother with electrical cord)

*Matter of Delaney v. Galeano*, 50 A.D.3d 1035 (2d Dept. 2008) (appeal dismissed because fourteen-year-old child did not want it to proceed and AFC failed to demonstrate basis upon which child's preference could properly be disregarded)

### **Controlling Effect Of AFC's 7.2 Determination**

*Matter of Mason v. Mason*, 103 A.D.3d 1207 (4th Dept. 2013) (AFC, who informed court of child's wishes, was not obligated to state basis for advocating contrary position, and record supported finding that child lacked capacity for knowing, voluntary and considered judgment)

*Matter of Krieger v. Krieger*, 65 A.D.3d 1350 (2d Dept. 2009) (court improperly required that AFC offer expert testimony regarding child's capacity to articulate desires, and whether child would be at imminent risk of harm if she moved with father to Ohio, before advocating position contrary to child's wishes; Rule 7.2 does not impose such a requirement)

### **Parent's Standing To Raise Issue**

*Matter of Elniski v. Junker*, 142 A.D.3d 1392 (4th Dept. 2016) (mother failed to preserve contentions that AFC was biased against her and failed to provide meaningful representation and act in child's best interests where mother made no motion to remove AFC)

*Matter of Roseman v. Sierant*, 142 A.D.3d 1323 (4th Dept. 2016) (in custody proceeding, father lacked standing to complain about court's alleged errors in proceeding with hearing in absence of AFC; there is general prohibition on one litigant raising legal rights of another)

**SOME CUSTODY/VISITATION ISSUES INVOLVING PARENTS,  
RELATIVES, AND SIBLINGS**

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May 16, 2017

**1. Application For Return Of Child Pursuant To FCA §1028**

Whenever a child has been temporarily removed, the court must hold a hearing to determine whether the child should be returned upon an application by the parent or other person legally responsible for the care of the child, or the child's attorney. See *Matter of J. Children*, 264 A.D.2d 524, 694 N.Y.S.2d 462 (2d Dept. 1999) (application improperly granted without full evidentiary hearing); but see *Matter of Aniyah Mc.*, 69 A.D.3d 729, 891 N.Y.S.2d 664 (2d Dept. 2010) (mother's application for immediate return of child improperly made during permanency hearing and not pursuant to FCA §1028 or §1061).

It appears that although an individual may qualify as a "person legally responsible" for purposes of being charged in an Article Ten proceeding, he/she does not have standing to demand a §1028 hearing unless he/she has some custodial interest in the child. Compare *Matter of Melissa H.*, 62 A.D.2d 1045, 404 N.Y.S.2d 49 (2d Dept. 1978) ("Section 1028 of the Family Court Act provides that, upon the application of a parent of a child temporarily removed for an order returning the child, the court shall hold a hearing within three court days of the application"); *Matter of Alexandria H.*, 159 Misc.2d 345, 604 N.Y.S.2d 471 (Fam. Ct., Kings Co., 1993) (father with joint custody had right to hearing to seek restoration of visitation rights); *Swipies v. Kofka*, 419 F.3d 709 (8th Cir. 2005) (non-custodial father entitled to prompt removal hearing) and *Gottlieb v. County of Orange*, 84 F.3d 511, 521 (2d Cir. 1996) (relies on *Alexandria H.*, supra) with *Matter of T.L.*, 13 Misc.3d 1179, 827 N.Y.S.2d 576 (Fam. Ct., Queens Co., 2006) (father who was excluded from home in which respondent mother resided with children had no right to hearing) and *Matter of Michael A.*, 149 Misc.2d 595, 565 N.Y.S.2d 949 (Fam. Ct., Bronx Co., 1990) (paramour had no standing where parent did not request hearing).

In *Matter of Lucinda R.*, 85 A.D.3d 78 (2d Dept. 2011), the Second Department held that the family court erred in denying the mother's application for a §1028 hearing because, the family court believed, there was no "removal" within the meaning of §1028 when the children were released to the father's care. The court noted that a survey of statutes within Article Ten shows that the word "removal" or "removed" is used in the context of the State's removal of the child from the home, and the concept of "removal" is not qualified. See also *Matter of Forrest S.-R.*, 101 A.D.3d 734 (2d Dep't 2012), lv denied 20 N.Y.3d 1092 (where child was removed and placed in temporary custody of father, due process was provided to mother via §1028 procedure); but see *Matter of Josephine BB.*, 114 A.D.3d 1096 (3d Dept. 2014) (mother not entitled to hearing where physical custody was changed from mother to father in custody proceeding before neglect proceeding had been commenced, and thus child had not been removed under Article

Ten). Whether or not the Second Department read the statute correctly, the end result cuts sharply against the well-settled rules that govern custody proceedings involving two biological parents. In a FCA Article Six custody battle between biological parents, either a best interests standard applies, or the non-custodial parent must prove a change in circumstances to get to a best interests hearing. Needless to say, neither parent would get the benefit of the very exacting *Nicholson v. Scopetta* imminent risk standard. So, one might ask, why should a respondent parent get a §1028 hearing, and the benefit of the imminent risk standard, merely because the non-respondent parent is seeking custody in the context of a FCA Article Ten proceeding? Why should the respondent parent regain temporary custody even though the non-respondent parent undoubtedly would prevail easily in an Article Six proceeding? Although, in *Lucinda R.*, the non-respondent father had filed a custody petition, only the family court's ruling regarding the applicability of §1028 was before the Second Department. The court focused on statutory construction, and did not address the anomaly that results when a respondent parent regains temporary custody even though the non-respondent parent would prevail in an Article Six proceeding. Accordingly, there is no reason to think that a respondent parent's right to a §1028 hearing precludes a non-respondent parent from seeking temporary custody pursuant to FCA Article Six. What if, in *Lucinda R.*, the father had formally requested a temporary custody hearing, and such a hearing had been consolidated with a §1028 hearing. Obviously, if imminent risk had been established, the father would have retained custody. But, even if imminent risk had not been established, he could have argued that because an Article Six petition was also before the court, the no imminent risk determination did not preclude issuance of a temporary custody order pursuant to Article Six. Cf. *Matter of Salvatore M.*, 90 A.D.3d 758 (2d Dept. 2011) (court not required to conduct hearing prior to releasing child into father's custody after petitioner withdrew allegations against father following completion of forensic evaluation and sexual abuse validation report which concluded that allegations against father were unfounded). The persuasiveness of such an argument becomes obvious when one contemplates a case in which a non-respondent parent appears later in the proceeding at a time when the respondent has physical custody of the children, and files an Article Six petition and requests a temporary custody hearing in the Article Six proceeding. In that scenario, §1028 would not even come into play since any order transferring temporary custody to the non-respondent parent under Article Six would not be an ACS or court-ordered "removal." Of course, the respondent parent could still regain custody later in the proceeding at a hearing to determine permanent custody. *Matter of Williams v. Dowgiallo*, 90 A.D.3d 942 (2d Dept. 2011) (award of temporary custody to father before hearing was only one factor to be considered since permanent award is treated as initial custody determination and court is not required to engage in change of circumstances analysis).

## **2. Temporary Custody**

A putative father is not entitled to intervene in the absence of evidence of paternity. See *Matter of Tyrone G. v. Fifi N.*, 189 A.D.2d 8, 594 N.Y.S.2d 224 (1st Dept. 1993) (rule allowing anyone claiming to be parent to intervene as of right "would wreak havoc on

child protective proceedings,” but court does have discretion to allow intervention when person may have legitimate claim to parenthood); see also *Matter of Paige WW.*, 71 A.D.3d 1200, 895 N.Y.S.2d 603 (3rd Dept. 2010) (although child’s attorney argued that respondent was not entitled to rights of biological parent because he was not married to mother and had not been adjudicated to be father, petition identified him as father, both father and mother testified without contradiction that he was father, and before child’s removal, father acknowledged paternity by living with her and supporting her); *Matter of Jonathan C.*, 51 Misc.3d 469 (Fam. Ct., Bronx Co., 2015) (motion to intervene denied based on judicial estoppel where putative father had denied paternity in prior proceeding, but he could intervene if he could demonstrate he was biological father; DNA testing ordered).

If a putative father is allowed to intervene, the court may issue an order of filiation pursuant to FCA §564. Such an order may be issued if both parents are present, the father waives the filing of a paternity petition and a hearing, and the court is satisfied as to paternity given the parents’ testimony or sworn statements. FCA §564(b). In the alternative, the court may direct the mother, or another appropriate petitioner (see FCA §522), to file a paternity petition. FCA §564(c). See, e.g., *Matter of Elacqua o/b/o Tiffany DD. v. James EE.*, 203 A.D.2d 688, 610 N.Y.S.2d 354 (3rd Dept. 1994) (child’s lawyer may commence proceeding). See also *Matter of Anthony “M”*, 271 A.D.2d 709, 705 N.Y.S.2d 715 (3rd Dept. 2000) (Article Ten petitioner had standing under FCA §522 or CPLR §3121(a) to seek DNA testing to determine paternity in abuse proceeding). Since the child’s lawyer has standing to bring a petition [FCA §522; *Matter of Elacqua o/b/o Tiffany DD. v. James EE.*, 203 A.D.2d 688], the lawyer should also have standing to object and request blood tests if the parents consent to an order under FCA §564 but the lawyer has a good faith belief that the individual before the court is not the father. See also *Hammack v. Hammack*, 291 A.D.2d 718, 737 N.Y.S.2d 702 (3rd Dept. 2002) (child’s lawyer had standing to raise equitable estoppel argument on behalf of children). Since pre-existing visitation rights may not be enforced unless an adjudication of paternity has been made or an acknowledgment of paternity has been executed (see FCA §1084), the court properly may be reluctant to release a child to a man who refuses to consent to a filiation order.

In some cases, the court should not even temporarily release a child to an intervenor before an adequate investigation has been conducted. *Matter of Cleophus B.*, 93 A.D.3d 1241 (4th Dept. 2012), lv denied 19 N.Y.3d 807 (court properly denied father’s motion for summary judgment vacating placement order and awarding him custody where derivative neglect charges against father had been dismissed, but he failed to allege facts demonstrating present ability to care for child and child had been in foster care for nine months); *Matter of Salvatore M.*, 90 A.D.3d 758 (2d Dept. 2011) (court not required to conduct hearing prior to releasing child into father’s custody after petitioner withdrew allegations against father following completion of forensic evaluation and sexual abuse validation report which concluded that allegations against father were unfounded); *Matter of Jesse M.*, 73 A.D.3d 780, 899 N.Y.S.2d 666 (2d Dept. 2010) (family court erred in awarding temporary custody to father without hearing since there were questions of fact as to whether father was "suitable" temporary custodian); *Matter*

of *Donovan C.*, 65 A.D.3d 1041, 884 N.Y.S.2d 863 (2d Dept. 2009) (family court not required to have full hearing on permanent custody before rendering determination on temporary custody and visitation where court was fully familiar with family); *Matter of Acquard v. Acquard*, 244 A.D.2d 1010, 666 N.Y.S.2d 57 (4th Dept. 1997) (absent extraordinary circumstances, temporary custody should not be transferred without evidentiary hearing where there are contested allegations); *Matter of Baby Girl L.*, 133 A.D.2d 458, 519 N.Y.S.2d 673 (2d Dept. 1987) (court also notes that evidence of paternity was inconclusive); *Ryan v. Department of Social Services of Albany County*, 16 Misc.3d 1134(A), 847 N.Y.S.2d 904 (Sup. Ct., Albany Co., 2007) (defendants did not violate plaintiffs' due process by recommending to family court that it ensure that father did not have drug problem before allowing him access to son, a neglected child who had been born with cocaine in his system).

Also, the court has the power, and perhaps a duty in some cases, to order the intervenor to undergo a mental health examination before granting him custody. See FCA §251 (court may "order any person within its jurisdiction and the parent ... to be examined by a physician, psychiatrist or psychologist ... when such an examination will serve the purposes of this act"); *Matter of Crystal H.*, 135 Misc.2d 265, 514 N.Y.S.2d 865 (Fam. Ct., N.Y. Co., 1987). Cf. *Melstein v. Melstein*, 96 A.D.2d 884, 466 N.Y.S.2d 40 (2d Dept. 1983) (visitation was properly denied where father refused to submit to psychiatric examination).

A criminal court order of protection that bars contact between the parent and the child, but includes a provision stating that the order is "subject to" subsequent family court orders of custody and visitation, permits the family court to release the child to the custody of that parent when the court determines that release would be in the child's best interests. *Matter of Rihana J.H.*, 147 A.D.3d 945 (2d Dept. 2017) (because criminal court's order was not made "subject to" subsequent family court orders, court had no authority to permit "kinship visitation" supervised by maternal grandmother); *Matter of Brianna L.*, 103 A.D.3d 181 (2d Dept. 2012) (court notes that children have counsel in family court but not in criminal court, that family court is uniquely situated to determine best interests and its authority should not be circumscribed by order which expressly contemplates future amendment by family court); but see *Troilo v. Troilo*, 0-11722-13/13A, NYLJ 1202643818377, at \*1 (Sup., WE, Decided February 7, 2014) (family court may not modify criminal court order of protection for reasons other than custody and visitation, not even if the criminal court intended to confer other decision making authority on family court).

When determining whether to grant a non-respondent parent's application for custody, the court must keep in mind traditional rules governing custody disputes between natural parents and non-parents. Thus, in the absence of extraordinary circumstances, such as unfitness, a non-respondent natural parent will usually have custodial rights superior to those of any other person or agency. See *In re M.M.*, 72 N.E.3d 260 (Ill. 2016) (error to place children in absence of finding of unfitness or finding that mother was unable or unwilling to care for children; even where best interest standard permeates and governs hearing, placement with third party requires prerequisite

consideration of parental fitness or else statute would run afoul of *Troxel v. Granville*, 530 U.S. 57); *Matter of Michael B.*, 80 N.Y.2d 299, 590 N.Y.S.2d 60 (1992); *Matter of John K.*, 302 A.D.2d 811, 755 N.Y.S.2d 513 (3rd Dept. 2003) (court rejects father's argument that he could not be found unfit in absence of Article Ten charges); *In re Dwayne McM.*, 289 A.D.2d 29, 734 N.Y.S.2d 121 (1st Dept. 2001); *Matter of Commissioner of Social Services o/b/o Tyrique P.*, 216 A.D.2d 387, 629 N.Y.S.2d 47 (2d Dept. 1995); *Matter of Alfredo S.*, 172 A.D.2d 528, 568 N.Y.S.2d 123 (2d Dept. 1991), appeal dismissed 78 N.Y.2d 899, 573 N.Y.S.2d 459 (1991); *Matter of Javaya R.*, NN-26814-11, NYLJ 1202725037639, at \*1 (Fam., NY, Decided March 23, 2015) (where non-respondent father sought modification of permanency order to reflect release of child to him, court concludes that it may curtail father's due process rights only upon showing by agency of extraordinary circumstances); *In re Miner*, 32 Misc.3d 1211(A) (Fam. Ct., Oswego Co., 2011) (court substitutes word "fit" for word "suitable" when determining whether to release child to non-respondent father; there is presumption of suitability in absence of abuse or neglect, abandonment, or unfitness, or other like extraordinary circumstances); see also *Ryan v. Department of Social Services of Albany County*, supra, 16 Misc.3d 1134(A) (in civil rights action, plaintiffs adequately pleaded substantive due process claims against individual defendants where reasonable trier of fact could conclude that defendants manifested deliberate indifference to, or reckless disregard of, father's liberty interest in raising child by engaging in five-year cycle of drug assessments, drug screening, drug rehabilitation programs, psychological and mental health evaluations, parenting classes, supervised visitation, and protracted family court litigation in absence of proof of neglect or abuse or unfitness; however, claims are dismissed based on qualified immunity since it would not have clear to reasonable social service workers that their actions violated father's substantive due process rights); but see *Matter of Angelina AA.*, 222 A.D.2d 967, 635 N.Y.S.2d 775 (3rd Dept. 1995) (mother, who had obtained custody in Article Ten proceeding and allegedly failed to cooperate with agency, could be deprived of custody absent evidence of serious misconduct or unfitness).

However, the custodial rights of the respondent parent cannot be disregarded. Compare *In re Aliyah B.*, 87 A.D.3d 943 (1st Dept. 2011) (mother failed to preserve objection to out-of-state relocation of child, and, in any event, release of child to father and relocation to Pennsylvania was proper where father wanted to move to Philadelphia to live in sister's home to improve children's lives, Pennsylvania agency assessed sister's home and found it to be appropriate and safe, and children's preference for remaining in father's care in Pennsylvania was entitled to some weight) with *Matter of Tumari W.*, 65 A.D.3d 1357, 885 N.Y.S.2d 753 (2d Dept. 2009) (court erred when it authorized ACS to release child to non-respondent father over respondent mother's objection, without attorney for child being present, without conditions, and without seeking information about father's home in St. Thomas pursuant to ICPC) and *In re Maiea P.*, 49 A.D.3d 291, 853 N.Y.S.2d 318 (1st Dept. 2008) (order awarding custody to non-respondent father reversed where decision was contrary to wishes of twelve-year-old child and recommendations of child's lawyer, agency caseworkers and mental health experts; agency records showed that mother complied with agency's plan and had warm and loving relationship with child; and there was evidence that father had interfered with

mother's relationship with child and that child's separation from siblings was having harmful effect on her emotional development).

Of course, the custodial rights of a non-respondent natural parent who resides with the children may be compromised by the presence in the home of the allegedly abusive or neglectful parent. See, e.g., *In re Maria M.*, 244 A.D.2d 255, 664 N.Y.S.2d 440 (1st Dept. 1997) (child improperly released to father with order of protection against mother where father refused to live apart from mother and was intimidated by her).

An order temporarily placing a child with a relative or relatives or other suitable person or persons, or remanding or placing a child with a local commissioner of social services to reside with a relative or relatives or suitable person or persons as foster parents, may not be granted unless the person or persons to whom the child is remanded or placed submits to the jurisdiction of the court with respect to the child. The order shall set forth the terms and conditions applicable to such person or persons and child protective agency, social services official and duly authorized agency with respect to the child and may include, but may not be limited to, a direction for such person or persons to cooperate in making the child available for court-ordered visitation with respondents, siblings and others and for appointments with and visits by the child protective agency, including visits in the home and in-person contact with the child protective agency, social services official or duly authorized agency, and for appointments with the child's attorney, clinician or other individual or program providing services to the child during the pendency of the proceeding. The court also may issue a temporary order of protection under FCA §1022(f), §1023 or §1029 and an order directing that services be provided pursuant to FCA §1015-a. FCA §1017(3).

The child's attorney should consider the possibility that the custodian would be able to obtain child support from the child's parent. Cf. *Labanowski v. Labanowski*, 49 A.D.3d 1051, 857 N.Y.S.2d 737 (3rd Dept. 2008) (court finds it "troubling" that child's attorney took no position on support issue).

In its discretion, the court may direct that the child reside in a specific certified foster home upon a determination that it is in the child's best interests. FCA §1017(2)(b). See *In re Brandon A.*, 50 A.D.3d 395, 855 N.Y.S.2d 457 (1st Dept. 2008) (family court had jurisdiction to stay child's return to former foster mother's care pending best interests hearing, and, after hearing, bar return despite fair hearing decision in foster mother's favor); *Matter of Joshua Noel A.*, 40 A.D.3d 749, 836 N.Y.S.2d 628 (2d Dept. 2007) (family court did not err in ordering, at permanency hearing, that child be moved to new foster home where, although children had closely bonded with foster parent, he lacked insight into medical condition of one of the children and failed to properly administer prescribed medicine); *Matter of Adrienne M.*, 201 A.D.2d 938 (4th Dept. 1994) (under §1017, court may order agency not to place child in specified foster home); *Matter of Shinice H.*, 194 A.D.2d 444, 599 N.Y.S.2d 37 (1st Dept. 1993); *Matter of Gunner T.*, 44 Misc.3d 539 (Fam. Ct., Clinton Co., 2014) (court has authority to direct placement in specific foster home pursuant to §1017(2)(b) after permanency hearing; Legislature intended to provide court with such authority throughout time child is in foster care);

Matter of Lanaya B., 25 Misc.3d 981, 886 N.Y.S.2d 319 (Fam. Ct., Kings Co., 2009) (contempt finding made based on nine-day delay in placing child in foster care with maternal uncle, as required by order; “For nine days of her infant’s life, this mother was not able to hold, feed, parent and bond with [the child], because she was placed in a stranger’s home instead of the home of a loving relative that this Court held to be in the best interests of [the child]”); Matter of Damien A., 195 Misc.2d 661, 760 N.Y.S.2d 825 (Fam. Ct., Suffolk Co., 2003) (while directing that mother and child who are both in foster care reside together, court relies on FCA §§ 255, 1015-a and 1055); see also Matter of V.P., 41 Misc.3d 926 (Fam. Ct., Kings Co., 2013) (contract foster care agency had no standing to move for order authorizing it to place child in home of maternal grandparents and directing ACS to file application for expedited placement under Interstate Compact).

Although it could be argued that the family court should have substantial discretion to transfer a child from one relative to another, particularly where the child did not reside for long with the first relative, it was held in *In re Dominick S.*, 289 A.D.2d 11, 733 N.Y.S.2d 191 (1st Dept. 2001) that, in the absence of a material change of circumstances, the family court should not have transferred the child, who had been with the great grandmother for about five weeks, to the grandmother. See also *Matter of Sarah S.*, 9 Misc.3d 1109(A), 806 N.Y.S.2d 448 (Fam. Ct., Monroe Co., 2005) (even if relative resource is fit, child can be removed from relative’s temporary custody where there has been a change of circumstances).

In cases in which the court has not specified a foster home and in all other cases, agencies are bound by the New York State Office of Children and Family Services’ Administrative Directive, 10-OCFS-ADM-16, which creates a state-wide requirement that the child’s attorney be notified of any change in the child’s foster care placement. The child’s attorney must be notified by the child’s local department of social services or voluntary foster care agency caseworker of a planned placement change at least 10 days in advance of the anticipated change in placement, or as soon as the decision is made, and no later than the next business day after an emergency move occurs. The notification must include the following: child’s name, DOB, and case number; reason for the child’s change in placement; date and time of change in placement; placement location prior to change; planned or new placement location and contact information; agency and official approving placement change.

It should be noted that, pursuant to FCA §1035(f), a non-respondent adult sibling, grandparent, aunt or uncle may, with the consent of any parent appearing in the proceeding, move to intervene in the proceeding as an interested party intervenor for the purpose of seeking temporary or permanent custody of the child, and, if permitted to intervene, may participate during the fact-finding stage in all arguments and hearings insofar as they affect the temporary custody of the child, and in all phases of dispositional proceedings. FCA §1035(f); see *Matter of Demetria FF.*, 140 A.D.3d 1388 (3d Dept. 2016) (§1035(f) authorizes intervention at permanency stage). However, given the amendments to FCA §1017 that took effect after enactment of §1035(f), this statute has become somewhat irrelevant. See *Matter of Tristram K.*, 36 A.D.3d 147, 824

N.Y.S.2d 232 (1st Dept. 2006) (consent requirement in §1035[f] remains applicable even though FCA §1017 has expanded role of relatives, but does not affect relative's right to be considered as custodial resource).

### **3. Custody Or Guardianship With Parent Or Other Relative Or Suitable Person Pursuant To Article Six**

#### **At Disposition**

At the conclusion of the dispositional hearing under this article, the court may enter an order of disposition granting custody or guardianship of the child to a respondent parent or parents, as defined in FCA §1012(l), or a relative or relatives or other suitable person or persons pursuant to FCA Article Six or an order of guardianship of the child to a relative or relatives or suitable person or persons under Article Seventeen of the Surrogate's Court Procedure Act if the following conditions have been met:

(i) the respondent parent or parents, relative or relatives or suitable person or persons has or have filed a petition for custody or guardianship of the child pursuant to Article Six or, in the case of a relative or relatives or suitable person or persons, a petition for guardianship of the child under the SCPA; and

(ii) the court finds that granting custody or guardianship of the child to such person or persons is in the best interests of the child and that the safety of the child will not be jeopardized if the respondent or respondents under the child protective proceeding are no longer under supervision or receiving services. In determining whether the best interests of the child will be promoted by the granting of guardianship of the child to a relative who has cared for the child as a foster parent, the court shall give due consideration to the permanency goal of the child, the relationship between the child and the relative, and whether the relative and the social services district have entered into an agreement to provide kinship guardianship assistance payments for the child to the relative under Title Ten of Article Six of the Social Services Law, and, if so, whether the fact-finding hearing pursuant to FCA §1051 and a permanency hearing pursuant to FCA §1089 have occurred and whether compelling reasons exist for determining that the return home of the child and the adoption of the child are not in the best interests of the child and are, therefore, not appropriate permanency options; and

(iii) the court finds that granting custody or guardianship of the child to the respondent parent, relative or suitable person under Article Six or granting guardianship of the child to the relative or suitable person under the SCPA will provide the child with a safe and permanent home; and

(iv) all parties to the child protective proceeding consent to the granting of custody or guardianship under Article Six or the granting of guardianship under the SCPA; or, if any of the parties object to the granting of custody or guardianship, the court has made the following findings after a joint dispositional hearing on the child protective petition and the petition under Article Six or under SCPA Article Seventeen: (A) if a relative or relatives or suitable person or persons have filed a petition for custody or guardianship and a parent or parents fail to consent to the granting of the petition, the court finds that the relative or relatives or suitable person or persons have demonstrated that

extraordinary circumstances exist that support granting an order of custody or guardianship to the relative or relatives or suitable person or persons and that the granting of the order will serve the child's best interests; or (B) if a relative or relatives or suitable person or persons have filed a petition for custody or guardianship and a party other than the parent or parents fail to consent to the granting of the petition, the court finds that granting custody or guardianship of the child to the relative or relatives or suitable person or persons is in the best interests of the child; or (C) if a respondent parent has filed a petition for custody under Article Six and a party who is not a parent of the child objects to the granting of the petition, the court finds either that the objecting party has failed to establish extraordinary circumstances, or, if the objecting party has established extraordinary circumstances, that granting custody to the petitioning respondent parent would nonetheless be in the child's best interests; or (D) if a respondent parent has filed a petition for custody under Article Six and the other parent objects to the granting of the petition, the court finds that granting custody to the petitioning respondent parent is in the child's best interests. FCA §1055-b(a); see also FCA §661(a) (terms "infant" or "minor" include person less than twenty-one years old who consents to appointment or continuation of guardian after the age of eighteen).

Where a proceeding filed by the non-respondent parent pursuant to Article Six is pending at the same time as an Article Ten proceeding, the court presiding over the Article Ten proceeding may jointly hear the dispositional hearing on the child protective petition and the hearing on the custody and visitation petition under Article Six; provided however, the court must determine the Article Six petition in accordance with the terms of that article. FCA §1055-b(a-1); see also *S.L. v. J.R.*, 27 N.Y.3d 558 (2016) (reaffirming rule that custody determinations should generally be made only after full and plenary hearing; although Appellate Division affirmed based on determination that court possessed "adequate relevant information to enable it to make an informed and provident determination as to the child's best interest," that undefined and imprecise standard is inappropriate); FCA §651(c-1) (authorizes joint Article Six/dispositional hearing); FCA §661(c) (where permanency goal is referral for legal guardianship, petition under this Article filed by fit and willing relative or other suitable person shall be filed with court before whom most recent proceeding under Article Ten or Ten-A is pending; that court may consolidate hearing of guardianship petition or permanent guardianship petition with dispositional or permanency hearing).

Where a proceeding brought in the supreme court involving the custody of, or right to visitation with, any child of a marriage is pending at the same time as an Article Ten proceeding brought in the family court, the family court may jointly hear the dispositional hearing on the child protective petition and, upon referral from the supreme court, the hearing to resolve the matter of custody or visitation; provided however, the family court must determine the non-respondent parent's custodial rights in accordance with the terms of Domestic Relations Law §240(1)(a). FCA §1055-b(a-2).

Regarding "extraordinary circumstances," see *Bennett v. Jeffreys*, 40 N.Y.2d 543, 387 N.Y.S.2d 821 (1976); see also *Matter of Suarez v. Williams*, 26 N.Y.3d 440 (2015) (under DRL §72(2), grandparents may demonstrate standing based on extraordinary

circumstances where child has lived with grandparents for prolonged period even if child had contact with, and spent time with, parent while child lived with grandparents; key is whether parent makes important decisions affecting child's life as opposed to merely providing routine care during visits); *Matter of Arlene Y.*, 76 A.D.3d 720, 906 N.Y.S.2d 645 (3rd Dept. 2010), lv denied 15 N.Y.3d 713 (grandmother failed to prove extraordinary circumstances where mother consented to finding of neglect, but there was no evidence she failed to maintain contact with children or failed to plan for their future in manner that would constitute persistent neglect); *In re Tristram K.*, 65 A.D.3d 894, 884 N.Y.S.2d 655 (1st Dept. 2009) (order terminating placement and discharging child to custody of aunt and uncle, and modifying permanency plan to permanent placement with aunt and uncle, upheld where mother's long separation from child came after she absconded to China with child during unsupervised visit, and, during separation, child bonded with aunt and uncle).

Although unrelated foster parents, under well-settled case law, do not have standing to petition for Article Six custody [see, e.g., *Katie B. v. Miriam H.*, 116 A.D.2d 545, 497 N.Y.S.2d 399 (2d Dept. 1986)], in the right circumstances a foster parent could argue that he/she is a "suitable person" entitled to custody. See *Matter of A.C. and S.Y.*, 98 P.3d 89 (Wash. Ct. App., 2004) (guardianship may be appropriate alternative where non-relative foster parents want long-term involvement and also to allow contact with biological parents); cf. *Matter of Matthew E.*, 41 A.D.3d 1240, 839 N.Y.S.2d 871 (4th Dept. 2007) (family court erred in awarding custody to grandfather and dismissing foster parents' custody petition with prejudice); *Webster v. Ryan*, 189 Misc.2d 86, 729 N.Y.S.2d 315 (Fam. Ct., Albany Co., 2001), rev'd on other grounds 292 A.D.2d 92, 740 N.Y.S.2d 162 (3rd Dept. 2002) (child has constitutional right to maintain contact with former foster parent).

A relative has standing to seek custody notwithstanding the fact that he/she at one point was a kinship foster parent. See *Matter of Isaiah O.*, 287 A.D.2d 816, 731 N.Y.S.2d 273 (3rd Dept. 2001).

In a contest with an unrelated would-be caretaker, relatives can argue that they have a constitutional liberty interest in the family relationship. See *Rivera v. Marcus*, 696 F.2d 1016 (2d Cir. 1982) (half-sister, who lived with half-brother and sister for several years before entering into foster care agreement with state and acting as surrogate mother, had liberty interest and was entitled, before foster care agreement was terminated, to be provided with timely and adequate notice of reasons for termination; opportunity to retain counsel; pre-removal hearing upon request in the absence of exceptional circumstance; opportunity to confront and cross-examine witnesses and present evidence and arguments; impartial decision-maker; and written statement of decision and summary of evidence supporting decision); *A.C. v. Mattingly*, 2007 WL 894268 (S.D.N.Y. 2007) (in litigation brought by infants who claim they were removed from kinship foster parents in violation of their constitutional rights, court concludes that plaintiffs have shown that they possess constitutionally-protected liberty interest in integrity of kinship foster family unit, and court will determine what due process must be afforded in connection with removal from the home); *Matter of G.B.*, 7 Misc.3d 1022(A),

801 N.Y.S.2d 233 (Fam. Ct., Monroe Co., 2005) (as in the case of a biological parent, intrinsic human rights are involved when a blood relative seeks custody, and public policy favors getting children out of foster care and into the homes of extended family members; blood relative's constitutional liberty interest in a child might allow him/her to prevail against an unrelated foster parent even when the standard best interests test would lead to a different result); but see *Gause v. Rensselaer Children*, 2010 WL 4923266 (NDNY 2010) (grandmother had no liberty interest where mother had custody prior to agency intervention).

A relative's ability to obtain custody may be compromised after the child has been residing with a foster family for an extended period of time. See *Matter of Amber B.*, 50 A.D.3d 1028, 857 N.Y.S.2d 590 (2d Dept. 2008) (court properly denied grandmother's custody application where she had little or no relationship with children prior to their entering foster care and had no relationship with them during first three years of placement); *Matter of Linda S.*, 50 A.D.3d 805, 856 N.Y.S.2d 174 (2d Dept. 2008) (grandmother did not possess right to custody superior to that of non-kinship foster parents, and her statutory rights did not entitle her to override right of parents to surrender child to public agency and confer on it right to consent to adoption of child); *Matter of Haylee RR.*, 47 A.D.3d 1093, 849 N.Y.S.2d 359 (3rd Dept. 2008) (court did not err in continuing placement in foster care rather than placing child with father's aunt where foster parents had preference for adoption since they had cared for child for more than a year, and child had lived with them since she was three months old and had visited with aunt on, at most, four occasions); *Matter of Matthew E.*, 41 A.D.3d 1240 (grandfather did not have greater right to custody than foster parents where child was placed in foster care when she was approximately three months old after she had suffered fractures to legs, wrists, ribs, and skull and lacerated liver while being cared for by parents, and, at that time, grandfather refused to take custody, had little contact with child thereafter except for one hour per week of supervised visitation, and did not petition for custody until, after five to six months, it became evident that his daughter would not regain custody); *Matter of D. A.*, 18 Misc.3d 200, 845 N.Y.S.2d 689 (Fam. Ct., Onondaga Co., 2007) (aunt's custody petition dismissed where agency chose her as suitable relative after child was over fifteen months old and had formed strong bond with foster family, change in physical custody would likely result in severe distress to child, and aunt did not exhibit same determination to parent that foster mother exhibited).

The court shall hold an age-appropriate consultation with the child, however, if the youth has attained fourteen years of age, the court shall ascertain his or her preference for a suitable guardian. Notwithstanding any other section of law, where the youth is over the age of eighteen, his or her consent to the appointment of a suitable guardian is required. FCA §1055-b(e).

The court's order shall set forth the required findings as described in FCA §1055-b(a) where applicable, including, if the guardian and the local department of social services have entered into an agreement to provide kinship guardianship assistance payments for the child to the relative, that a fact-finding hearing pursuant to FCA §1051 and a permanency hearing pursuant to FCA §1089 have occurred, and the compelling

reasons that exist for determining that the return home of the child and the adoption of the child are not in the best interests of the child and are, therefore, not appropriate permanency options for the child. This order shall constitute the final disposition of the child protective proceeding. Notwithstanding any other provision of law, the court shall not issue an order of supervision nor may the court require the local department of social services to provide services to the respondent or respondents when granting custody or guardianship. FCA §1055-b(b).

As part of the order, the court may require that the local department of social services and the attorney for the child receive notice of and be made parties to any subsequent proceeding to modify a FCA Article Six order, provided, however, that if the guardian and the local department of social services had entered into an agreement to provide kinship guardianship assistance payments for the child to the relative under Title Ten of Article Six of the Social Services Law, the order must require that the local department of social services and the attorney for the child receive notice of, and be made parties to, any subsequent proceeding regarding custody or guardianship of the child. FCA §1055-b(c).

The custody or guardianship order shall conclude the court's jurisdiction over the Article Ten proceeding and the court shall not maintain jurisdiction over the parties for the purposes of permanency hearings held pursuant to FCA Article Ten-A. FCA §1055-b(d). See also *In re Nikole S. v. Jordan W.*, 123 A.D.3d 497 (1st Dept. 2014) (in upholding order denying custody petition brought by child's cousin, court notes, among other things, effect that awarding custody would have had on agency's ability to reunite respondent mother with child); *Matter of Nicolette I.*, 110 A.D.3d 1250 (3d Dept. 2013) (award of custody to aunt did not constitute de facto termination of parental rights by depriving parents of DSS services); *Matter of N.L.G.*, \_Misc.3d\_, 2017 WL 2022566 (Fam. Ct., Queens Co., 2017) (court "reluctantly" grants kinship guardianship petition where aunt had promoted or acquiesced in campaign of parental alienation against father and children could not have been alienated without collective failure of everyone involved in proceedings to recognize aunt's behavior, but aunt had been foster parent for eight and a half years and children were bonded to her, there was no place else for children to live since mother had signed surrender and children's minds had been poisoned against father, and adoption was not appropriate since children had not been freed; court directs aunt to comply with terms and conditions that seek to rectify years of alienation); *Matter of D. Children*, 25 Misc.3d 1208(A), 901 N.Y.S.2d 898 (Fam. Ct., Kings Co., 2009) (direct placement with aunt more appropriate than order of custody since mother continued to need services, it was unclear whether agency intended to proceed with termination petition, and direct placement would allow agency to continue to monitor home); FCA §657 (upon application by non-parent possessing lawful order of guardianship or custody, public school shall enroll child upon verification of lawful order and residence within school district; person with custody order also has right to enroll and receive coverage for child in employer based health insurance plan and to assert same legal rights under employer based health insurance plans as persons who possess lawful orders of guardianship, and persons possessing lawful order of guardianship shall have right and responsibility to make decisions, including issuing any

necessary consents, regarding child's protection, education, care and control, health and medical needs, and physical custody of person of child, but child retains ability to consent to medical care as otherwise provided by law).

### **At Permanency Hearing**

Where the permanency plan is placement with a fit and willing relative or a respondent parent, the court may issue an order of custody or guardianship in response to a petition filed by a respondent parent, relative or suitable person seeking custody or guardianship of the child under FCA Article Six or an order of guardianship under Article Seventeen of the Surrogate's Court Procedure Act. A petition for custody or guardianship may be heard jointly with a permanency hearing held pursuant to this article. An order of custody or guardianship issued in accordance with this subdivision will result in termination of all pending orders issued pursuant to Article Ten-A or Article Ten if the following conditions have been met:

(i) the court finds that granting custody to the respondent parent or parents, relative or relatives or suitable person or persons, or guardianship to the relative or relatives or suitable person or persons, is in the best interests of the child and that the termination of the order placing the child pursuant to Article Ten will not jeopardize the safety of the child. In determining whether the best interests of the child will be promoted by the granting of guardianship of the child to a relative who has cared for the child as a foster parent, the court shall give due consideration to the permanency goal of the child, the relationship between the child and the relative, and whether the relative and the local department of social services have entered into an agreement to provide kinship guardianship assistance payments for the child to the relative under Title Ten of Article Six of the Social Services Law, and, if so, whether a fact-finding hearing pursuant to FCA §1051 has occurred, and whether compelling reasons exist for determining that the return home of the child and the adoption of the child are not in the best interests of the child and are, therefore, not appropriate permanency options; and

(ii) the court finds that granting custody to the respondent parent or parents, relative or relatives or suitable person or persons, or guardianship of the child to the relative or relatives or suitable person or persons, will provide the child with a safe and permanent home; and

(iii) the parents, the attorney for the child, the local department of social services, and the foster parent of the child who has been the foster parent for the child for one year or more consent to the issuance of an order of custody or guardianship under Article Six or the granting of guardianship under the SCPA and the termination of the order of placement pursuant to Article Ten-A or Article Ten; or (iv), if any of the parties object to the granting of custody or guardianship, the court has made the following findings after a consolidated joint hearing on the permanency of the child and the petition under Article Six or SCPA Article Seventeen: (A) if a relative or relatives or suitable person or persons have filed a petition for custody or guardianship and a parent or parents fail to consent to the granting of the petition, the court finds that the relative or relatives or suitable person or persons have demonstrated that extraordinary circumstances exist that support granting an order of custody or guardianship under Article Six or the granting of guardianship under the SCPA to the relative or relatives or suitable person

or persons and that the granting of the order will serve the child's best interests; or (B) if a relative or relatives or suitable person or persons have filed a petition for custody or guardianship and the local department of social services, the attorney for the child, or the foster parent of the child who has been the foster parent for the child for one year or more objects to the granting of the petition, the court finds that granting custody or guardianship of the child to the relative or relatives or suitable person or persons is in the best interests of the child; or (C) if a respondent parent has filed a petition for custody under Article Six and a party who is not a parent of the child objects to the granting of the petition, the court finds either that the objecting party has failed to establish extraordinary circumstances, or, if the objecting party has established extraordinary circumstances, that granting custody to the petitioning respondent parent would nonetheless be in the child's best interests; or (D) if a respondent parent has filed a petition for custody under Article Six and the other parent fails to consent to the granting of the petition, the court finds that granting custody to the petitioning respondent parent is in the child's best interests. FCA §1089-a(a).

Where a proceeding filed by a non-respondent parent pursuant to Article Six is pending at the same time as an Article Ten-A proceeding, the court presiding over the Article Ten-A proceeding may jointly hear the permanency hearing and the hearing on the custody and visitation petition under Article Six; provided however, the court must determine the non-respondent parent's custody petition filed under Article Six in accordance with the terms of that article. FCA §1089-a(a-1); see also FCA §651(c-1) (authorizes joint Article Six/permanency hearing).

Where a proceeding brought in the supreme court involving the custody of, or right to visitation with, any child of a marriage is pending at the same time as a proceeding brought in the family court pursuant to Article Ten-A, the court presiding over the proceeding under Article Ten-A may jointly hear the permanency hearing and, upon referral from the supreme court, the hearing to resolve the matter of custody or visitation in the proceeding pending in the supreme court; provided however, the court must determine the non-respondent parent's custodial rights in accordance with the terms of Domestic Relations Law §240(1)(a). FCA §1089-a(a-2).

The court shall hold an age-appropriate consultation with the child, however, if the youth has attained fourteen years of age, the court shall ascertain his or her preference for a suitable guardian. Notwithstanding any other section of law, where the youth is over the age of eighteen, his or her consent to the appointment of a suitable guardian is required. FCA §1089-a(e).

The court's order shall set forth the required findings as described in FCA §1089-a(a), where applicable, including, if the guardian and local department of social services have entered into an agreement to provide kinship guardianship assistance payments for the child to the relative under Title Ten of Article Six of the Social Services Law, that a fact-finding hearing pursuant to FCA §1051 and a permanency hearing pursuant to FCA §1089 have occurred, and the compelling reasons that exist for determining that the return home (and adoption? - which is mentioned in FCA §1055-b(b)) of the child are

not in the best interests of the child and are, therefore, not appropriate permanency options for the child, and shall result in the termination of any orders in effect pursuant to FCA Article Ten or Ten-A. Notwithstanding any other provision of law, the court shall not issue an order of supervision nor may the court require the local department of social services to provide services to the respondent or respondents when granting custody or guardianship pursuant to FCA Article Six under this section or the granting of guardianship under SCPA Article Seventeen in accordance with this section. FCA §1089-a(b).

As part of the order granting custody or guardianship to the relative or suitable person in accordance with this section pursuant to Article Six or the granting of guardianship under SCPA Article Seventeen, the court may require that the local department of social services and the attorney for the child receive notice of, and be made parties to, any subsequent proceeding to modify the order of custody or guardianship granted pursuant to the Article Six proceeding; provided, however, if the guardian and the local department of social services have entered into an agreement to provide kinship guardianship assistance payments for the child to the relative under title ten of article six of the social services law, the order must require that the local department of social services and the attorney for the child receive notice of, and be made parties to, any such subsequent proceeding involving custody or guardianship of the child. FCA §1089-a(c).

Any order entered under FCA 1089-b shall conclude the court's jurisdiction over the Article Ten proceeding and the court shall not maintain jurisdiction over the proceeding for further permanency hearings. FCA §1089-a(d).

#### **4. Sibling Placement And Visitation**

##### **At Outset Of Case**

A child must be placed with any siblings or half-siblings who are also being remanded, or have previously been remanded or placed in foster care, unless placement together would be contrary to their best interests. Placement together is presumptively in the children's best interest if it would not be contrary to their health, safety or welfare. FCA §1027-a(a). See, e.g., *Banks-Nelson v. Bane*, 214 A.D.2d 338, 625 N.Y.S.2d 131 (1st Dept. 1995) (once agency properly removed one sibling from the foster home, the other children had to be moved absent a strong countervailing reason not to); *Matter of Peters v. McCaffrey*, 173 A.D.2d 934, 569 N.Y.S.2d 797 (3rd Dept. 1991). See also 18 NYCRR §431.10(b) (provides, inter alia, that social services district is responsible for ensuring that diligent efforts are made to secure a foster family boarding home or agency boarding home which is willing and able to accept the siblings together; that factors to be considered in making best interests determination must include, but are not limited to, age differentiation of siblings, health and developmental differences among siblings, emotional relationship of siblings to each other, individual services needs, attachment of individual siblings to separate families/locations, and continuity of environment

standards; that foster parents must be informed if any child placed with them has siblings or half-siblings, and if so, the location of siblings or half-siblings; and that agencies are responsible for ensuring that diligent efforts are made to facilitate regular biweekly visitation or communication between minor siblings or half-siblings who have been placed apart, unless such contact would be contrary to health, safety or welfare of one or more of the children or unless lack of geographic proximity precludes visitation); *In re Meridian H.*, 798 N.W.2d 96 (Neb. 2011) (state statutes and regulations which reflect policy favoring preservation of sibling relationship do so within context of best interests determinations, but do not provide siblings with cognizable interest in sibling relationship separate and distinct from that of subject child); *Matter of Jamel B.*, 53 Misc.3d 1206(A) (Fam. Ct., Kings Co., 2016) (court finds ACS in contempt for failing to timely place children together where efforts were made but greater efforts could have been made to obtain responses from foster care agencies, and responsibility for failures by agencies rests with ACS); *Matter of Austin M.*, 37 Misc.3d 1218(A) (Fam. Ct., Monroe Co., 2011), appeal dism'd 96 A.D.2d 1423 (reasonable efforts not found where agency failed to provide adequate sibling visitation and investigate possibility of placing children in same home).

If the agency cannot place the children together at first, it must do so within thirty days. FCA §1027-a. Finally, the child's religion and the religious wishes of the parents must be considered in the selection of a foster care resource. See FCA §116.

### **At Disposition**

The court may direct the commissioner to place the subject child with minor siblings or half-siblings who have previously been placed in the custody of the commissioner, or to arrange regular visitation and other forms of communication between the children, if the court finds that such placement, or visitation and other communication, would be in the child's best interests. FCA §1055(g). See, e.g., *Matter of Justyce HH.*, 136 A.D.3d 1181 (3d Dept. 2016) (sibling visits not warranted where child and half-sibling had never had contact and did not have existing relationship); *Matter of John B.*, 289 A.D.2d 1090, 735 N.Y.S.2d 333 (4th Dept. 2001) (child improperly removed from foster home to reside with brother in another home where child had lived with foster parents and their adopted daughter since she was an infant); *Matter of Tremmel A.*, 50 Misc.3d 1219(A) (Fam. Ct., Monroe Co., 2016) (infant not moved to home of half-brother's adoptive family where infant was attached to foster family and it would have been detrimental to infant to disrupt attachment, but visits ordered despite nine-year age difference and no current emotional relationship since relationship may be important in future); see also *In re Meridian H.*, 798 N.W.2d 96 (Neb. 2011) (state statutes and regulations which reflect policy favoring preservation of sibling relationship do so within context of best interests determinations, but do not provide siblings with cognizable interest in sibling relationship separate and distinct from that of subject child); *Matter of Jamel B.*, 53 Misc.3d 1206(A) (Fam. Ct., Kings Co., 2016) (court finds ACS in contempt for failing to timely place children together where efforts were made but greater efforts could have been made to obtain responses from foster care agencies, and responsibility for failures by agencies rests with ACS); *Matter of Austin M.*, 37 Misc.3d 1218(A) (Fam. Ct., Monroe Co., 2012),

appeal dism'd 96 A.D.3d 1423 (reasonable efforts not found where agency failed to provide adequate sibling visitation and investigate possibility of placing children in same home). Such visitation or communication is presumptively in the child's best interests unless it would be contrary to the child's health, safety or welfare, or visitation is precluded or prevented by a lack of geographical proximity. FCA §1055(g).



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**Representation in Family Court Proceedings**

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**Topic Three**

**Domestic Violence Cases: Prosecuting &  
Defending**



# The Domestic Violence Interview At A Glance

## **A. UNDERSTAND THE DYNAMICS OF DOMESTIC VIOLENCE**

### **Know the Obstacles to Leaving**

Survivors face many barriers when they are making up their minds to leave an abusive relationship. Leaving is a process. The average battered woman leaves 7 to 8 times before permanently leaving a relationship. Some of the obstacles to leaving include:

#### **1) Fear of Increased Violence**

Survivor may have tried to leave and may know there is an increased risk of violence with another attempt. The survivor may stay in a relationship while strategizing the safest time to leave. "Separation violence" may include:

- a. Stalking, harassment or threats;
- b. Withholding the children or holding the survivor hostage;
- c. Retaliation if the abuser finds the survivor;
- d. Destruction of survivor's belongings or home;
- e. Harm to survivor's job or reputation;
- f. More severe abuse or homicide;
- g. Charging survivor with a crime;
- h. Harming children, pets, family or friends;
- i. The abuser committing suicide; and
- j. Court or police involvement.

#### **2) Fear of Being Alone**

The survivor may fear:

- a. Being without a partner; and
- b. Being unable to take care of the coping with children.

# The Domestic Violence Interview At A Glance

## 3) Financial Dependence

Financial challenges that survivors frequently face are:

- a. Lack of employment;
- a. Limited education or work experience;
- b. Shortage of cash;
- c. No access to bank account;
- d. Lack of transportation, childcare, food, clothing, housing, healthcare and insurance; and
- e. No social resources, including support from friends and families.

## 4) Concern For Children

Child-related issues that prevent survivor from leaving:

- a. Concern that abuser may charge survivor with 'kidnapping' or sue for custody;
- b. Worry that abuser may abduct or abuse the children;
- c. Fear of losing custody of children; and
- d. Understanding that child needs a relationship with the abuser.

## 5) Religious or Family Issues

- a. Family expectation for survivor to stay in marriage "at any cost";
- b. Family denial of the violence;
- c. Family blaming of survivor for the violence;
- d. Religious disapproval of divorce; and
- e. Religious leader may tell survivor to "stay and pray".

## 6) Denial

- a. Belief that the abusive behavior isn't who the batterer really is;
- b. Thinking that the violence is temporary – there will be more good times; and
- c. Acceptance of abuse'sr promise that it will "never happen again".

# The Domestic Violence Interview At A Glance

## 7) Internalization of the Abuser's Attitudes

The survivor may suffer from low self-esteem, depression and anxiety as a result of the abuse that undermines confidence to leave. Survivors may blame themselves for the violence:

- a. Abuser states repeatedly it is survivor's fault; and
- b. Survivor takes responsibility to "fix" it.

## 8) Love and/or Commitment to the Relationship

- a. Belief that the abuser fulfills the survivors dream of romantic love
- b. Understanding that the abuser has had a hard life; and
- c. Feeling that the abuser needs the survivor.

## 9) Guilt and Shame

- a. Guilt about choosing an abuser;
- b. Fear of disappointing family members; and
- c. Guilt about failure of the relationship.

## 10) Hope

The survivors have often built a life around the relationship, and may hope for change.

- a. Abuser's acknowledgment of need for change; and
- b. Survivor's dream of a life together "happily ever after".

## B. MAKE A SAFETY PLAN

### Review Safety Considerations With Client- Especially Lethality Indicators:

- 1) Ownership/access to guns;
- 2) Prior use of weapon when abusive;
- 3) Threatens use of weapons;

## The Domestic Violence Interview At A Glance

- 4) Prior serious injury from abuse;
- 5) Threats of suicide;
- 6) Drug or alcohol abuse;
- 7) Forced sex; and
- 8) Obsessiveness/extreme jealousy/extreme dominance.

### **Address Safety Considerations For Court Appearances**

- 9) Obtain assistance from advocate, relative or friend;
- 10) Ask for help from Court Attendant;
- 11) Find a safe location in Courthouse;
- 12) Refrain from contact with The abuser and family;
- 13) Obtain the order before leaving; and
- 14) Arrange for escort after appearance.

### **C. PROVIDE LEGAL COUNSEL AND ASSISTANCE**

**Download Address Confidentiality, Family Offense, Custody, Visitation and Support Petitions Online at:**

<http://www.nycourts.gov/forms/familycourt/general.shtml>

#### **1) Motion For Address Confidentiality**

<http://www.nycourts.gov/forms/familycourt/pdfs/gf-21.pdf>

- a. Make application when filing initial papers;
- b. Request to have address designated as “confidential”;
- c. Complete and Sign “Address Confidentiality Affidavit”;
- d. State the reason why reason why the address should not be disclosed

## The Domestic Violence Interview At A Glance

Choosing one of the following reasons:

1. Disclosure of address would pose an unreasonable risk to survivor's health, safety or survivor's child's health or safety; or
2. Survivor is in a residential program for victims of domestic violence or a shelter provided for parents accompanying abused or neglected children, or a shelter for homeless persons; or
3. Survivor was previously granted address confidentiality.

### **2) Family Offense Petition and Affidavit in Support of TOP**

<https://www.nycourts.gov/forms/familycourt/pdfs/8-2.pdf>

<http://www.nycourts.gov/forms/familycourt/pdfs/gf-5b.pdf>

**Family Offenses Specified.** A family offense petition may be filed when a family member claims that another family member committed one of the following acts against another family member:

1. Disorderly conduct;
2. Harassment;
3. Aggravated harassment;
4. Menacing;
5. Reckless endangerment;
6. Assault or attempted assault;
7. Stalking; and
8. Criminal mischief.

## The Domestic Violence Interview At A Glance

**b. Family Members Defined.** "Family members" are defined as individuals related by blood or marriage, individuals who were formerly married, or individuals who are unrelated but have a child together.

### **c. Procedure On Day One After Filing**

1. The petitioner has the right to an immediate court appearance upon filing.
2. For "good cause", the judge may issue a temporary order of protection and/or temporary child support. The temporary order of protection lasts until the Respondent is scheduled to appear in court.
3. The petitioner may be assigned counsel if eligible.
4. The next court date will be set and a summons for the Respondent will be issued... If the petitioner is in imminent danger, the judge can issue a warrant for the Respondent to be brought to court.
5. If Family Court is not in session, the petitioner may obtain an order of protection from Criminal Court if the circumstances so warrant.

### **d. Procedure After First Appearance**

1. The Respondent may admit or deny the allegations described in the petition.
2. If the Respondent denies the allegations, counsel may be assigned if the party is eligible.
3. The Respondent may consent to the entry of the order of protection.
4. If the Respondent denies the allegations, a fact-finding hearing is held to determine if the allegations in the petition are true.

### **e. Procedure Upon Fact-Finding and Dispositional Hearings**

1. If the judge determines that the allegations have been proven, a dispositional hearing is held. Before this second hearing takes place, the court

## The Domestic Violence Interview At A Glance

may adjourn in order to make inquiries into circumstances of the individuals involved.

2. If the judge determines that the allegations have not been proven, the petition is dismissed.

### **f. Dispositional Order**

If the allegations are proven and a dispositional hearing is held, the judge will issue a dispositional order which may include any of the following:

1. Suspending judgment for 6 months;
2. Placing the Respondent on probation for up to 1 year and requiring the Respondent to participate in a batterer's education program which may include alcohol and/or drug treatment, and require the Respondent to pay the costs of the program;
3. Requiring the Respondent to pay restitution of up to \$10,000; or
4. Making a final order of protection that may be effective for up to 2 years, or up to 5 years with a finding by a judge of aggravating circumstances.

### **g. Contents of a Final Order of Protection**

<http://www.nycourts.gov/forms/familycourt/pdfs/gf-5a.pdf>

A final order of protection may include the requirement that the Respondent:

1. Stay away from the petitioner and any children involved;
2. Pay reasonable counsel fees of the petitioner;
3. Participate in a batterer's education program;
4. Pay petitioner's medical bills for injuries sustained as a result of the abuse;
5. Stay away from the home, school, or place of employment of the petitioner and any children involved;

## The Domestic Violence Interview At A Glance

6. Refrain from committing additional family offenses or acts that endanger the welfare of other family members;
7. Be permitted to remove personal property from a shared residence at a time designated by the court;
8. Be permitted to visit with any children at court designated times and places;
9. Refrain from intentionally injuring or killing, without justification, any companion animal the Respondent knows to be owned, possessed, leased, kept, or held by the petitioner or a minor child residing in the household.

### **h. Violations of Protection Orders:**

<http://www.nycourts.gov/forms/familycourt/pdfs/gf-8.pdf>

A petitioner can file a violation petition if the Respondent violates the Order of Protection. If a violation is proven, the court may take the following action:

1. Modify the Order of Protection;
2. Sentence the Respondent to up to 6 months in jail for each violation;
3. Transfer the case to a criminal court where the Respondent may face a substantially longer jail sentence;
4. Revoke or suspend the Respondent's license to carry a firearm;
5. Arrange for the surrender and disposal of any firearm the Respondent possesses where there is a risk that it will be used to harm the petitioner or where the violation of the order involved violent behavior.

### **3) Custody and Support Petitions**

<http://www.nycourts.gov/forms/familycourt/pdfs/gf-17.pdf>

<https://www.nycourts.gov/forms/familycourt/pdfs/4-3.pdf>

- a. Petitioner can file separate petitions seeking this relief.

## The Domestic Violence Interview At A Glance

- b. Petitioner can request this relief as part of O Docket petition.
- c. Practices vary between jurisdictions.
- d. Orders of custody, visitation and support end when Order of Protection expires.
- e. Domestic Relations Law Section 240 requirements:

“Where either party to an action concerning custody of or a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party, as such family or household member is defined in article eight of the family court act, and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section and state on the record how such findings, facts and circumstances factored into the direction.”

#### **4) Divorce Proceedings**

Completion of Family Court Family Offense, support and custody proceedings may or may not be preferable or required prior to commencement of divorce proceedings, depending upon the jurisdiction.

#### **5) Child Welfare Advocacy**

- a. Domestic Violence in the presence of the child can be a basis for neglect proceedings.

## The Domestic Violence Interview At A Glance

b. Verbal Abuse and physical abuse in the presence of the child can each serve as a basis for neglect.

c. Survivor's return to the abuser a frequent allegation in neglect petitions.

d. Survivor's repeated return to the abuser can lead to a Termination of Parental Rights.

### **6) Criminal Action**

Petitioner has the right to pursue a family offense case in either Criminal Court or Family Court, or both. In Family Court, the judge can issue an order of protection, among other remedies, as well as determine temporary custody and visitation of any children who may be involved. In Criminal Court, the judge can impose more severe sentences, including jail time. In addition, a family offense is considered a criminal act in Criminal Court, which means that the prosecutor can move ahead with a case without the consent or cooperation of the petitioner or abused individual.

### **D. MAKE APPROPRIATE REFFERALS**

- 1) 24-Hour Crisis & Support Line
- 2) Shelter
- 3) Law Enforcement Agency
- 4) District Attorney
- 5) Domestic Violence Counseling
- 6) Family Court

**FAMILY COURT OF THE STATE OF NEW YORK  
COUNTY OF ONONDAGA**

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In the Matter of a Proceeding Under  
Article 8 of the Family Court Act,

Petitioner,

**Family File No.:**  
**Docket No's.: O-**

**AFFIDAVIT IN SUPPORT  
OF MOTION TO  
DISMISS**

Respondent.

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STATE OF NEW YORK     )  
COUNTY OF ONONDAGA   ) ss.:

, Esq., being duly sworn, deposes and says as follows:

1. I am an attorney duly licensed to practice law in the State of New York with offices at:
  
2. I have been assigned to represent the Respondent in an Article 8 proceeding under the Family Court Act under the above listed Docket No., and as such am fully familiar with the facts and circumstances of this case.
3. The Petitioner filed a family offense petition seeking an order of protection against The Respondent.
4. That the allegations in the petition against the Respondent include the following:
  
5. That under the Family Court Act (hereinafter "FCA") section 812 there are a limited number of enumerated offenses which the Family Court may consider as a basis for an order of protection:
  
6. That in The Petitioner's petition she alleged that the Respondent committed an act which

constitutes the following family offense:

7. under the New York State Penal Law

Is defined as:

8. Allegations in a family offense petition must be composed of evidentiary facts that establish each and every element of the specific family offense being charged. The petition does not allege acts, which if proven, would constitute the crime of disorderly conduct.

9. Under the New York State Penal Law the alleged family offense

Is defined as

11. The acts alleged by The Petitioner do not constitute either of the two offenses she selected in her petition or any of the other enumerated offenses in FCA § 812 and therefore this Court lacks subject matter jurisdiction to hear this case and this petition should be summarily dismissed on this ground.

**WHEREFORE**, your deponent respectfully requests that this Court grant Respondent's motion to dismiss the family offense petition based on lack of subject matter jurisdiction for the Petitioner's failure to allege acts, which if proven, would constitute any of the enumerated crimes which constitute a family offense under section 812 of the Family Court Act and for such other and further relief as the Court may determine.

Sworn To Before Me On the \_\_\_\_ day of \_\_\_\_\_.

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**§ 842. Order of protection, NY FAM CT § 842**

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KeyCite Yellow Flag - Negative Treatment  
Proposed Legislation

**McKinney's Consolidated Laws of New York Annotated**

**Family Court Act (Refs & Annos)**

**Article 8. Family Offenses Proceedings (Refs & Annos)**

**Part 4. Orders**

**McKinney's Family Court Act § 842**

**§ 842. Order of protection**

**Effective: December 18, 2013**

Currentness

An order of protection under section eight hundred forty-one of this part shall set forth reasonable conditions of behavior to be observed for a period not in excess of two years by the petitioner or respondent or for a period not in excess of five years upon (i) a finding by the court on the record of the existence of aggravating circumstances as defined in paragraph (vii) of subdivision (a) of section eight hundred twenty-seven of this article; or (ii) a finding by the court on the record that the conduct alleged in the petition is in violation of a valid order of protection. Any finding of aggravating circumstances pursuant to this section shall be stated on the record and upon the order of protection. The court may also, upon motion, extend the order of protection for a reasonable period of time upon a showing of good cause or consent of the parties. The fact that abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient ground for denying or failing to extend the order. The court must articulate a basis for its decision on the record. The duration of any temporary order shall not by itself be a factor in determining the length or issuance of any final order. Any order of protection issued pursuant to this section shall specify if an order of probation is in effect. Any order of protection issued pursuant to this section may require the petitioner or the respondent:

(a) to stay away from the home, school, business or place of employment of any other party, the other spouse, the other parent, or the child, and to stay away from any other specific location designated by the court, provided that the court shall make a determination, and shall state such determination in a written decision or on the record, whether to impose a condition pursuant to this subdivision, provided further, however, that failure to make such a determination shall not affect the validity of such order of protection. In making such determination, the court shall consider, but shall not be limited to consideration of, whether the order of protection is likely to achieve its purpose in the absence of such a condition, conduct subject to prior orders of protection, prior incidents of abuse, extent of past or present injury, threats, drug or alcohol abuse, and access to weapons;

(b) to permit a parent, or a person entitled to visitation by a court order or a separation agreement, to visit the child at stated periods;

(c) to refrain from committing a family offense, as defined in subdivision one of section eight hundred twelve of this act, or any criminal offense against the child or against the other parent or against any person to whom custody of the child is awarded, or from harassing, intimidating or threatening such persons;

**§ 842. Order of protection, NY FAM CT § 842**

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(d) to permit a designated party to enter the residence during a specified period of time in order to remove personal belongings not in issue in this proceeding or in any other proceeding or action under this act or the domestic relations law;

(e) to refrain from acts of commission or omission that create an unreasonable risk to the health, safety or welfare of a child;

(f) to pay the reasonable counsel fees and disbursements involved in obtaining or enforcing the order of the person who is protected by such order if such order is issued or enforced;

(g) to require the respondent to participate in a batterer's education program designed to help end violent behavior, which may include referral to drug and alcohol counselling, and to pay the costs thereof if the person has the means to do so, provided however that nothing contained herein shall be deemed to require payment of the costs of any such program by the petitioner, the state or any political subdivision thereof;

(h) to provide, either directly or by means of medical and health insurance, for expenses incurred for medical care and treatment arising from the incident or incidents forming the basis for the issuance of the order;

(i) 1. to refrain from intentionally injuring or killing, without justification, any companion animal the respondent knows to be owned, possessed, leased, kept or held by the petitioner or a minor child residing in the household.

2. "Companion animal", as used in this section, shall have the same meaning as in subdivision five of section three hundred fifty of the agriculture and markets law;

(j) 1. to promptly return specified identification documents to the protected party, in whose favor the order of protection or temporary order of protection is issued; provided, however, that such order may: (A) include any appropriate provision designed to ensure that any such document is available for use as evidence in this proceeding, and available if necessary for legitimate use by the party against whom such order is issued; and (B) specify the manner in which such return shall be accomplished.

2. For purposes of this subdivision, "identification document" shall mean any of the following: (A) exclusively in the name of the protected party: birth certificate, passport, social security card, health insurance or other benefits card, a card or document used to access bank, credit or other financial accounts or records, tax returns, any driver's license, and immigration documents including but not limited to a United States permanent resident card and employment authorization document; and (B) upon motion and after notice and an opportunity to be heard, any of the following, including those that may reflect joint use or ownership, that the court determines are necessary and are appropriately transferred to the protected party: any card or document used to access bank, credit or other financial accounts or records, tax returns, and any other identifying cards and documents; and

**§ 842. Order of protection, NY FAM CT § 842**

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(k) to observe such other conditions as are necessary to further the purposes of protection.

The court may also award custody of the child, during the term of the order of protection to either parent, or to an appropriate relative within the second degree. Nothing in this section gives the court power to place or board out any child or to commit a child to an institution or agency.

Notwithstanding the provisions of section eight hundred seventeen of this article, where a temporary order of child support has not already been issued, the court may in addition to the issuance of an order of protection pursuant to this section, issue an order for temporary child support in an amount sufficient to meet the needs of the child, without a showing of immediate or emergency need. The court shall make an order for temporary child support notwithstanding that information with respect to income and assets of the respondent may be unavailable. Where such information is available, the court may make an award for temporary child support pursuant to the formula set forth in subdivision one of section four hundred thirteen of this act. Temporary orders of support issued pursuant to this article shall be deemed to have been issued pursuant to section four hundred thirteen of this act.

Upon making an order for temporary child support pursuant to this subdivision, the court shall advise the petitioner of the availability of child support enforcement services by the support collection unit of the local department of social services, to enforce the temporary order and to assist in securing continued child support, and shall set the support matter down for further proceedings in accordance with article four of this act.

Where the court determines that the respondent has employer-provided medical insurance, the court may further direct, as part of an order of temporary support under this subdivision, that a medical support execution be issued and served upon the respondent's employer as provided for in section fifty-two hundred forty-one of the civil practice law and rules.

In any proceeding in which an order of protection or temporary order of protection or a warrant has been issued under this section, the clerk of the court shall issue to the petitioner and respondent and his counsel and to any other person affected by the order a copy of the order of protection or temporary order of protection and ensure that a copy of the order of protection or temporary order of protection be transmitted to the local correctional facility where the individual is or will be detained, the state or local correctional facility where the individual is or will be imprisoned, and the supervising probation department or the department of corrections and community supervision where the individual is under probation or parole supervision.

Notwithstanding the foregoing provisions, an order of protection, or temporary order of protection where applicable, may be entered against a former spouse and persons who have a child in common, regardless of whether such persons have been married or have lived together at any time, or against a member of the same family or household as defined in subdivision one of section eight hundred twelve of this article.

In addition to the foregoing provisions, the court may issue an order, pursuant to section two hundred twenty-seven-c of the real property law, authorizing the party for whose benefit any order of protection has been issued to terminate a lease or rental agreement pursuant to section two hundred twenty-seven-c of the real property law.

The protected party in whose favor the order of protection or temporary order of protection is issued may not be held to violate an order issued in his or her favor nor may such protected party be arrested for violating such order.

**§ 842. Order of protection, NY FAM CT § 842**

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**Credits**

(L.1962, c. 686. Amended L.1972, c. 761, § 1; L.1980, c. 532, § 1; L.1981, c. 416, § 17; L.1981, c. 965, § 4; L.1984, c. 948, § 11; L.1988, c. 702, § 3; L.1988, c. 706, § 9; L.1994, c. 222, § 22; L.1994, c. 224, § 3; L.1995, c. 483, §§ 11, 12; L.2003, c. 579, § 1, eff. Oct. 22, 2003; L.2006, c. 253, § 6, eff. July 26, 2006; L.2007, c. 73, § 5, eff. Oct. 1, 2007; L.2008, c. 56, pt. D, § 8, eff. April 23, 2008; L.2008, c. 326, § 9, eff. July 21, 2008; L.2010, c. 325, §§ 1, 2, eff. Aug. 13, 2010; L.2010, c. 341, § 6, eff. Aug. 13, 2010; L.2011, c. 62, pt. C, subpt. B, § 114, eff. March 31, 2011; L.2013, c. 480, § 9, eff. Nov. 13, 2013; L.2013, c. 526, § 6, eff. Dec. 18, 2013.)

**Editors' Notes**

**SUPPLEMENTARY PRACTICE COMMENTARIES**

by Prof. Merrill Sobie

**2016**

**The Duration**

Section 842 authorizes the court to extend the duration of an order of protection for a “reasonable period of time upon a showing of good cause ...” (see the 2010 Supplementary Commentary). In *Matter of Molloy v. Molloy*, 137 A.D.3d 47, 24 N.Y.S.3d 333 (2d Dept. 2016), the court initially issued a two year order of protection. As the expiration date approached the petitioner requested a five year extension, citing numerous violations. While the matter was pending in the Family Court, the respondent was convicted in the New York City Criminal Court for a new offense which he had committed against the petitioner and the Criminal Court issued a new two year order of protection. The Family Court then dismissed the motion for a five year extension, reasoning that the goal of a Section 842 had already been achieved.

The Second Department disagreed and granted the five year requested extension. “ ... The Criminal Court’s issuance of an order of protection did not preclude the Family Court from extending the order of protection it had previously issued ... Thus, it was entirely proper for the petitioner to seek an extension of the Family Court order of protection.”

**2015**

**Appeals and Mootness**

Orders of protection have widely varying lifespans. A Section 842 order may remain in effect for many years, or may expire in months. Appeals are time consuming and ordinarily do not reach determination for at least one year following the order’s issuance. Hence, an order of protection may have expired during the appeal’s pendency.

**§ 842. Order of protection, NY FAM CT § 842**

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Until this year the appellate courts had held that when an order of protection has expired, the appeal becomes moot; see, e.g., *Matter of Veronica P. v. Radcliffe A.*, 110 A.D.3d 486, 972 N.Y.S.2d 522 (1st Dept. 2013). That has changed with the Court of Appeals decision which reversed the Appellate Division *Veronica* decision, *Matter of Veronica P. v. Radcliffe A.*, 24 N.Y.3d 668, 3 N.Y.S.3d 288, 26 N.E.3d 1143 (2015). In a unanimous decision, the court held that expiration of an order of protection does not moot the appeal because the order may nevertheless impose enduring collateral consequences, including an enhanced future criminal sentence, an increased likelihood of arrest, and use of the expired order to impair the respondent's credibility in future legal matters. An expired order may also place a severe stigma on the respondent. Hence an appeal can no longer be deemed to be moot based on the fact that it has expired.

**2014**

Section 842 has been amended by adding two new provisions [L. 2013, c. 480]. First, the respondent may be ordered to promptly return specific "identification documents" to the petitioner, e.g., a birth certificate, passport, tax return, or health insurance card. Second, the statute now stipulates that the "protected party" (petitioner) "... may not be held to violate an order issued in his or her favor nor may such protected party be arrested for violating such order". (See, also, revised Section 168.)

The "identification documents" inclusion appears to be a logical, if perhaps belated, provision. The amendment concerning violations does not alter existing law. The practical difficulty, as has always been the case, is if and when the parties reconcile. Reconciled parties do not usually rush back to court to terminate or modify an order upon consent, leaving the respondent, but not the petitioner, in a legally precarious situation.

**2010**

***The Duration***

A Section 842 order of protection may be effective for a maximum period of two years or, when aggravating circumstances are found, may be effective for a maximum period of five years. Until now, extensions beyond the maximum duration were not possible unless the respondent committed a violation or a new offense. No longer. A 2010 amendment to the section permits the court to, "upon motion, extend the order of protection for a reasonable period of time upon a showing of good cause or consent of the parties." [L.2010, c. 325]. Further, the fact that abuse has not occurred during the initial period covered by the order of protection is not, in itself, "sufficient ground to deny extension".

The amendment is extraordinarily open-ended. "Good cause" is not defined, nor may one readily fathom what may be a "reasonable period of time". Many orders of protection are based on non-violent offenses, such as harassment or disorderly conduct. Further, an order may run against someone who, two years later, has ceased any contact or relationship with the petitioner. In the absence of any meaningful criteria, extensive litigation to determine the amendment's parameters is inevitable, and inconsistent decisions may predominate.

**PRACTICE COMMENTARIES**

by Prof. Merril Sobie

## § 842. Order of protection, NY FAM CT § 842

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The petitioner's primary goal in filing a family offense petition is almost always the securing of an order of protection. Section 842 governs such orders, and is the section the Court and counsel turn to upon finding a family offense (if not sooner -- Section 828, which governs temporary orders of protection, leads directly to Section 842).

### The Conditions

Section 842 enumerates a wide array of terms and conditions which may be incorporated in an order of protection, ranging from refraining to commit any further family offenses, to the protection of the petitioner's "companion animal" [§ 842(i)]. In addition to the multitude of specific conditions, the Court may order the respondent "to refrain from acts of commission or omission that create an unreasonable risk to the health, safety or welfare of a child" [§ 842(e)], or, in the ultimate catchall, "to observe such other conditions as are necessary to further the purpose of protection" [§ 842(j)]. The Court may thereby craft almost any condition or restriction from whole cloth, and the parties and counsel may suggest appropriate terms beyond those enumerated in the statute. A protective order also does not preclude an order of probation supervision; the two remedies may run simultaneously, and may reinforce each other.

The only check on the inclusion of a specific condition is the requirement, found in the Section's opening sentence; the order "shall set forth *reasonable* conditions of behavior" (emphasis added). Just what is reasonable in a given case may be arguable; the determination is left to the sound discretion of the Court (subject to appeal, which would be determined only after the passage of several months).

Orders of protection are not necessarily based on contemporaneous acts. For example, in *Matter of Nina K. v. Victor K.*, 195 Misc.2d 726, 761 N.Y.S.2d 448 (Fam. Ct. Kings Co. 2003), the respondent had in 1998 threatened the petitioner if she did not recant her testimony against him in an unrelated federal case. At that time he was convicted and subsequently incarcerated for almost five years. Upon his release, Family Court held that the petitioner was entitled to a Section 842 order of protection predicated on his earlier threats.

### Duration

As originally enacted, Section 842 authorized the Court to issue an order of protection 'for a period not in excess of one year' [L.1962, c. 686, § 842]. However, in 2003 the Legislature doubled the permissible duration of an "ordinary order" to two years, and established a new species of order, which may remain in effect for five years, predicated on "the existence of aggravating circumstances" [L.2003, c. 579]. The increase represents a quantum jump, and orders of protection may remain in effect for very lengthy periods of time. As a matter of practice, in many cases the order's duration may be the paramount negotiation or litigation issue.

"Aggravating circumstances", as defined in Section 827(a)(vii), include, inter alia, "physical injury or serious physical injury to the petitioner caused by the respondent", "the use of a dangerous instrument", and, as a catchall, "... like incidents, behaviors and occurrences which to the court constitute an immediate and ongoing danger to the petitioner, or any member of the petitioner's family or household". In addition, Section 842 stipulates that any violation of valid order of protection constitutes an "aggravating circumstance". Ergo, a relatively innocuous violation may result in a five year restrictive order. The Section paints with a very broad brush. Section 842's wide scope is illustrated in *Wright v. Wright*, 4 A.D.3d 683, 772 N.Y.S.2d 740 (3d Dept. 2004). The petitioner husband and the respondent wife had been married for 30 years, and, for whatever reason, the relationship had become turbulent. The Appellate Division upheld the issuance of a three year order of protection against the wife based on the crime of attempted assault in the third degree, coupled with the aggravating circumstance of "physical injury" (*Wright* preceded the 2003 amendment -- today the same conduct could result in a five year protective order).

§ 842. Order of protection, NY FAM CT § 842

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Orders of protection may also involve a child, indeed may be tantamount to a decree depriving a parent of custody or visitation (indirectly, by ordering the respondent to “stay away” from his child, or by the outright issuance of a custody decree). The ability to issue prolonged orders exacerbates the problem of determining custody in the guise of a family offense (see below).

### Orders of Protection and Children

Section 842 orders may enjoin a party, including a party who is a parent, to “stay away from ... the child”. Less obliquely, the Section permits the Court to “... also award custody of the child, during the term of the order of protection to either parent, or to an appropriate relative within the second degree”. For good measure, the paragraph concerning child custody concludes with the sentence “[t]he court may also upon the showing of special circumstances extend the order of protection for a reasonable period of time”. Thus, custody or visitation may be decided for up to five years without further review, and thereafter be extended upon a finding of special circumstances.

The provisions create multiple problems. First, the Section assumes jurisdiction to determine child custody. That is not necessarily true; child custody and visitation jurisdiction is determined solely by applying the Uniform Child Custody Jurisdiction and Enforcement Act (Domestic Relations Law Article 75-a). Section 842 cannot trump the UCCJEA, and the Article 8 Court may lack jurisdiction when, for example, temporary or permanent custody has been determined by a court in a different state, or when the jurisdictional prerequisites for an initial determination, such as “home state”, cannot be met; see, e.g., *Matter of Hearne v. Hearne*, 61 A.D.3d 758, 878 N.Y.S.2d 81 (2d Dept. 2009), where the Appellate Division reversed a Family Court order of protection issued on behalf of a child when a Delaware court had issued a custody decree. For that matter, custody or visitation may have been determined or is pending in another New York court, thereby precluding the assumption of jurisdiction (or at least creating a conflict).

Second, the procedures and the substance of a custody determination pursuant to Article 6 or Domestic Relations Law Section 240 may be short-circuited by relying solely upon Article 8. The need for a petition and notice may be circumvented, and an attorney to represent the child may be absent (the assignment of a child’s attorney is common in an Article 6 case, but rare in an Article 8 case). Further, the over-arching “best interests of the child” standard is missing in Section 842. The better practice is to encourage or direct the filing of an Article 6 petition and, after preliminary and fact-finding proceedings, schedule a consolidated dispositional hearing to determine both the Article 6 and the Article 8 petitions.

Family offenses may also be related to child abuse or neglect, matters which are governed by Article 10. Section 1056 authorizes the Court to issue an order of protection upon entering a finding of abuse or neglect. However, a Section 1056 order against a parent cannot extend beyond the underlying dispositional order, and is hence reviewable every six months when the child is in placement, or annually when the child is not in placement; see *Matter of Sheena D.*, 8 N.Y.3d 136, 831 N.Y.S.2d 92, 863 N.E.2d 96 (2007). In contrast, an identical Section 842 order may remain in effect without review for five years.

This brings us to *Matter of Ram-Parker v. Parker*, 23 Misc.3d 482, 871 N.Y.S.2d 871 (Fam. Ct. Bronx Co. 2009). *Parker* involved both an Article 10 proceeding and an Article 8 proceeding (the history, which involved several courts, is rather convoluted). Upon motion, the Court granted a Section 842 order, but, citing *Sheena D.*, held that the order is periodically reviewable. It would be best to statutorily separate child custody from Article 8, or at least conform Article 8 to Article 10, Article 6, and the UCCJEA. Consistency is a desirable and achievable legislative goal.

**§ 842. Order of protection, NY FAM CT § 842**

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Section 842 further permits the Court to issue a temporary child support order. Again, the Section assumes that the Court has jurisdiction, although for child support purposes jurisdiction is determined solely by Section 580-201 (the Section is incorporated in the Uniform Interstate Family Support Act). Moreover, the carefully crafted Article 4 procedures are absent. It would be preferable if Section 842 simply authorized the Court to direct the forthwith filing of an Article 4 petition, and the Court then proceeded by applying the relevant Article 4 provisions (see the Commentary following Section 828).

**Counsel Fees**

Subdivision (f) authorizes the Court to order the respondent “to pay the reasonable counsel fees and disbursements in obtaining or enforcing ...” an order of protection. Hence the petitioner may be reimbursed. However, the converse is not possible, i.e., the Court cannot order the petitioner to pay the respondent’s counsel fees and costs, even when the respondent has prevailed; see *Matter of W.M.S. v. E.J.J.*, N.Y.L.J. 3/29/04, p. 20 (Fam. Ct. Nassau Co. 2004).

**Real Property**

Section 842’s concluding paragraph permits the Court to authorize a party for whose benefit an order of protection has been entered to terminate a lease or rental agreement pursuant to Section 227-c of the Real Property Law. The Court may also determine which party remains in possession of a house or apartment directly via an order of protection, or indirectly by ordering the respondent to “stay away”. However, the ownership or real property cannot be determined under Article 8. A party may be granted exclusive occupancy, but the underlying ownership remains. (By way of contrast, Domestic Relations Law Section 236 permits the Court to equitably distribute “marital property” in a divorce or annulment action, including the marital home or other real property.)

Notes of Decisions (125)

McKinney’s Family Court Act § 842, NY FAM CT § 842  
Current through L.2016, chapters 1 to 422.

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§ 842-a. Suspension and revocation of a license to carry,...., NY FAM CT § 842-a

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KeyCite Yellow Flag - Negative Treatment  
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated

Family Court Act (Refs & Annos)

Article 8. Family Offenses Proceedings (Refs & Annos)

Part 4. Orders

McKinney's Family Court Act § 842-a

§ 842-a. Suspension and revocation of a license to carry, possess, repair or dispose of a firearm or firearms pursuant to section 400.00 of the penal law and ineligibility for such a license; order to surrender firearms

Effective: March 16, 2013

Currentness

1. Suspension of firearms license and ineligibility for such a license upon the issuance of a temporary order of protection. Whenever a temporary order of protection is issued pursuant to section eight hundred twenty-eight of this article, or pursuant to article four, five, six, seven or ten of this act:

(a) the court shall suspend any such existing license possessed by the respondent, order the respondent ineligible for such a license, and order the immediate surrender pursuant to subparagraph (f) of paragraph one of subdivision a of section 265.20 and subdivision six of section 400.05 of the penal law, of any or all firearms owned or possessed where the court receives information that gives the court good cause to believe that: (i) the respondent has a prior conviction of any violent felony offense as defined in section 70.02 of the penal law; (ii) the respondent has previously been found to have willfully failed to obey a prior order of protection and such willful failure involved (A) the infliction of physical injury, as defined in subdivision nine of section 10.00 of the penal law, (B) the use or threatened use of a deadly weapon or dangerous instrument as those terms are defined in subdivisions twelve and thirteen of section 10.00 of the penal law, or (C) behavior constituting any violent felony offense as defined in section 70.02 of the penal law; or (iii) the respondent has a prior conviction for stalking in the first degree as defined in section 120.60 of the penal law, stalking in the second degree as defined in section 120.55 of the penal law, stalking in the third degree as defined in section 120.50 of the penal law or stalking in the fourth degree as defined in section 120.45 of such law; and

(b) the court shall where the court finds a substantial risk that the respondent may use or threaten to use a firearm unlawfully against the person or persons for whose protection the temporary order of protection is issued, suspend any such existing license possessed by the respondent, order the respondent ineligible for such a license, and order the immediate surrender pursuant to subparagraph (f) of paragraph one of subdivision a of section 265.20 and subdivision six of section 400.05 of the penal law, of any or all firearms owned or possessed.

2. Revocation or suspension of firearms license and ineligibility for such a license upon the issuance of an order of protection. Whenever an order of protection is issued pursuant to section eight hundred forty-one of this part, or pursuant to article four, five, six, seven or ten of this act:

**§ 842-a. Suspension and revocation of a license to carry,.... NY FAM CT § 842-a**

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(a) the court shall revoke any such existing license possessed by the respondent, order the respondent ineligible for such a license, and order the immediate surrender pursuant to subparagraph (f) of paragraph one of subdivision a of section 265.20 and subdivision six of section 400.05 of the penal law, of any or all firearms owned or possessed where the court finds that the conduct which resulted in the issuance of the order of protection involved (i) the infliction of physical injury, as defined in subdivision nine of section 10.00 of the penal law, (ii) the use or threatened use of a deadly weapon or dangerous instrument as those terms are defined in subdivisions twelve and thirteen of section 10.00 of the penal law, or (iii) behavior constituting any violent felony offense as defined in section 70.02 of the penal law; and

(b) the court shall, where the court finds a substantial risk that the respondent may use or threaten to use a firearm unlawfully against the person or persons for whose protection the order of protection is issued, (i) revoke any such existing license possessed by the respondent, order the respondent ineligible for such a license and order the immediate surrender pursuant to subparagraph (f) of paragraph one of subdivision a of section 265.20 and subdivision six of section 400.05 of the penal law, of any or all firearms owned or possessed or (ii) suspend or continue to suspend any such existing license possessed by the respondent, order the respondent ineligible for such a license, and order the immediate surrender pursuant to subparagraph (f) of paragraph one of subdivision a of section 265.20 and subdivision six of section 400.05 of the penal law, of any or all firearms owned or possessed.

3. Revocation or suspension of firearms license and ineligibility for such a license upon a finding of a willful failure to obey an order of protection or temporary order of protection. Whenever a respondent has been found, pursuant to section eight hundred forty-six-a of this part to have willfully failed to obey an order of protection or temporary order of protection issued pursuant to this act or the domestic relations law, or by this court or by a court of competent jurisdiction in another state, territorial or tribal jurisdiction, in addition to any other remedies available pursuant to section eight hundred forty-six-a of this part:

(a) the court shall revoke any such existing license possessed by the respondent, order the respondent ineligible for such a license, and order the immediate surrender pursuant to subparagraph (f) of paragraph one of subdivision a of section 265.20 and subdivision six of section 400.05 of the penal law, of any or all firearms owned or possessed where the willful failure to obey such order involves (i) the infliction of physical injury, as defined in subdivision nine of section 10.00 of the penal law, (ii) the use or threatened use of a deadly weapon or dangerous instrument as those terms are defined in subdivisions twelve and thirteen of section 10.00 of the penal law, or (iii) behavior constituting any violent felony offense as defined in section 70.02 of the penal law; or (iv) behavior constituting stalking in the first degree as defined in section 120.60 of the penal law, stalking in the second degree as defined in section 120.55 of the penal law, stalking in the third degree as defined in section 120.50 of the penal law or stalking in the fourth degree as defined in section 120.45 of such law; and

(b) the court shall where the court finds a substantial risk that the respondent may use or threaten to use a firearm unlawfully against the person or persons for whose protection the order of protection was issued, (i) revoke any such existing license possessed by the respondent, order the respondent ineligible for such a license, whether or not the respondent possesses such a license, and order the immediate surrender pursuant to subparagraph (f) of paragraph one of subdivision a of section 265.20 and subdivision six of section 400.05 of the penal law, of any or all firearms owned or possessed or (ii) suspend any such existing license possessed by the respondent, order the respondent ineligible for such a license, and order the immediate surrender of any or all firearms owned or possessed.

4. Suspension. Any suspension order issued pursuant to this section shall remain in effect for the duration of the temporary

§ 842-a. Suspension and revocation of a license to carry,.... NY FAM CT § 842-a

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order of protection or order of protection, unless modified or vacated by the court.

5. Surrender. (a) Where an order to surrender one or more firearms has been issued, the temporary order of protection or order of protection shall specify the place where such firearms shall be surrendered, shall specify a date and time by which the surrender shall be completed and, to the extent possible, shall describe such firearms to be surrendered and shall direct the authority receiving such surrendered firearms to immediately notify the court of such surrender.

(b) The prompt surrender of one or more firearms pursuant to a court order issued pursuant to this section shall be considered a voluntary surrender for purposes of subparagraph (f) of paragraph one of subdivision a of section 265.20 of the penal law. The disposition of any such firearms shall be in accordance with the provisions of subdivision six of section 400.05 of the penal law.

(c) The provisions of this section shall not be deemed to limit, restrict or otherwise impair the authority of the court to order and direct the surrender of any or all pistols, revolvers, rifles, shotguns or other firearms owned or possessed by a respondent pursuant to this act.

6. Notice. (a) Where an order of revocation, suspension or ineligibility has been issued pursuant to this section, any temporary order of protection or order of protection issued shall state that such firearm license has been suspended or revoked or that the respondent is ineligible for such license, as the case may be.

(b) The court revoking or suspending the license, ordering the respondent ineligible for such license, or ordering the surrender of any firearm shall immediately notify the statewide registry of orders of protection and the duly constituted police authorities of the locality of such action.

(c) The court revoking or suspending the license or ordering the defendant ineligible for such license shall give written notice thereof without unnecessary delay to the division of state police at its office in the city of Albany.

(d) Where an order of revocation, suspension, ineligibility, or surrender is modified or vacated, the court shall immediately notify the statewide registry of orders of protection and the duly constituted police authorities of the locality concerning such action and shall give written notice thereof without unnecessary delay to the division of state police at its office in the city of Albany.

7. Hearing. The respondent shall have the right to a hearing before the court regarding any revocation, suspension, ineligibility or surrender order issued pursuant to this section, provided that nothing in this subdivision shall preclude the court from issuing any such order prior to a hearing. Where the court has issued such an order prior to a hearing, it shall commence such hearing within fourteen days of the date such order was issued.

**§ 842-a. Suspension and revocation of a license to carry,...., NY FAM CT § 842-a**

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8. Nothing in this section shall delay or otherwise interfere with the issuance of a temporary order of protection.

**Credits**

(Added L.1996, c. 644, § 4, eff. Nov. 1, 1996. Amended L.1998, c. 597, § 7, eff. Dec. 22, 1998; L.1999, c. 635, § 9, eff. Dec. 1, 1999; L.2000, c. 434, § 3, eff. Oct. 20, 2000; L.2013, c. 1, § 4, eff. March 16, 2013.)

**Editors' Notes**

**SUPPLEMENTARY PRACTICE COMMENTARIES**

by Prof. Merrill Sobie

**2013**

Section 842-a has been amended to require that in several enumerated situations the court order a suspension of a firearms license when issuing a temporary or permanent order of protection, such as when the respondent had been found to have violated a previous order and the violation resulted in physical injury, or there is a substantial risk that the respondent may use or thereafter use of a firearm. The amendment aligns Section 842-a with Criminal Procedure Law Section 530.14 (the CPL provision covers analogous criminal court cases). Several other Family Court Act sections have also been amended, mandating a Section 842-a determination whenever the court issues an order of protection.

**PRACTICE COMMENTARIES**

by Prof. Merrill Sobie

Section 842-a grants the Court jurisdiction to suspend a respondent's firearm license in certain circumstances, and to order the immediate surrender of firearms which are owned or possessed by the respondent. The procedures and safeguards are clearly spelled out, including the right, unusual in Article 8, to a hearing within fourteen days after issuance of a temporary Section 842-a order [subdivision 7].

However, neither Section 842-a nor any other Article 8 section authorizes the Court to order the return of firearms, and the Court consequently lacks jurisdiction to entertain an application; see *Blauman v. Blauman*, 2 A.D.3d 727, 769 N.Y.S.2d 584 (2d Dept. 2003). The dichotomy is illustrated in *Aloi v. Nassau County Sheriff's Department*, N.Y.L.J., 8/3/05, p. 20 (Sup. Ct. Nassau Co. 2005). Family Court had initially issued a temporary order of protection and a Section 842-a order, but both had been withdrawn as part of a negotiated settlement. In the absence of Family Court jurisdiction, the respondent's only recourse was a new petition in Supreme Court (the Sheriff understandably refused to return the firearms in the absence of a court order), thereby delaying the lawful return of his property, increasing litigation costs and legal fees, and placing an unnecessary burden on the Supreme

**§ 842-a. Suspension and revocation of a license to carry,...., NY FAM CT § 842-a**

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Court. The apparent jurisdictional oversight can be remedied only through legislation.

Notes of Decisions (9)

Footnotes

1

So in original. The word "to" inadvertently omitted.

McKinney's Family Court Act § 842-a, NY FAM CT § 842-a  
Current through L.2016, chapters 1 to 422.

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End of Document

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§ 530.12 Protection for victims of family offenses, NY CRIM PRO § 530.12

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KeyCite Yellow Flag - Negative Treatment  
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Three. Special Proceedings and Miscellaneous Procedures
Title P. Procedures for Securing Attendance at Criminal Actions and Proceedings of Defendants and Witnesses Under Control of Court--Recognizance, Bail and Commitment (Refs & Annos)
Article 530. Orders of Recognizance or Bail with Respect to Defendants in Criminal Actions and Proceedings--when and by What Courts Authorized (Refs & Annos)

McKinney's CPL § 530.12

§ 530.12 Protection for victims of family offenses

Effective: October 22, 2015

Currentness

1. When a criminal action is pending involving a complaint charging any crime or violation between spouses, former spouses, parent and child, or between members of the same family or household, as members of the same family or household are defined in subdivision one of section 530.11 of this article, the court, in addition to any other powers conferred upon it by this chapter may issue a temporary order of protection in conjunction with any securing order committing the defendant to the custody of the sheriff or as a condition of any order of recognizance or bail or an adjournment in contemplation of dismissal.

(a) In addition to any other conditions, such an order may require the defendant: (1) to stay away from the home, school, business or place of employment of the family or household member or of any designated witness, provided that the court shall make a determination, and shall state such determination in a written decision or on the record, whether to impose a condition pursuant to this paragraph, provided further, however, that failure to make such a determination shall not affect the validity of such temporary order of protection. In making such determination, the court shall consider, but shall not be limited to consideration of, whether the temporary order of protection is likely to achieve its purpose in the absence of such a condition, conduct subject to prior orders of protection, prior incidents of abuse, past or present injury, threats, drug or alcohol abuse, and access to weapons;

(2) to permit a parent, or a person entitled to visitation by a court order or a separation agreement, to visit the child at stated periods;

(3) to refrain from committing a family offense, as defined in subdivision one of section 530.11 of this article, or any criminal offense against the child or against the family or household member or against any person to whom custody of the child is awarded, or from harassing, intimidating or threatening such persons;

**§ 530.12 Protection for victims of family offenses, NY CRIM PRO § 530.12**

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(4) to refrain from acts of commission or omission that create an unreasonable risk to the health, safety and welfare of a child, family or household member's life or health;

(5) to permit a designated party to enter the residence during a specified period of time in order to remove personal belongings not in issue in this proceeding or in any other proceeding or action under this chapter, the family court act or the domestic relations law;

(6)(A) to refrain from intentionally injuring or killing, without justification, any companion animal the defendant knows to be owned, possessed, leased, kept or held by the victim or a minor child residing in the household.

(B) "Companion animal", as used in this section, shall have the same meaning as in subdivision five of section three hundred fifty of the agriculture and markets law;

(7)(A) to promptly return specified identification documents to the protected party, in whose favor the order of protection or temporary order of protection is issued; provided, however, that such order may: (i) include any appropriate provision designed to ensure that any such document is available for use as evidence in this proceeding, and available if necessary for legitimate use by the party against whom such order is issued; and (ii) specify the manner in which such return shall be accomplished.

(B) For purposes of this subparagraph, "identification document" shall mean any of the following: (i) exclusively in the name of the protected party: birth certificate, passport, social security card, health insurance or other benefits card, a card or document used to access bank, credit or other financial accounts or records, tax returns, any driver's license, and immigration documents including but not limited to a United States permanent resident card and employment authorization document; and (ii) upon motion and after notice and an opportunity to be heard, any of the following, including those that may reflect joint use or ownership, that the court determines are necessary and are appropriately transferred to the protected party: any card or document used to access bank, credit or other financial accounts or records, tax returns, and any other identifying cards and documents.

(b) The court may issue an order, pursuant to section two hundred twenty-seven-c of the real property law, authorizing the party for whose benefit any order of protection has been issued to terminate a lease or rental agreement pursuant to section two hundred twenty-seven-c of the real property law.

2. Notwithstanding any other provision of law, a temporary order of protection issued or continued by a family court pursuant to section eight hundred thirteen of the family court act shall continue in effect, absent action by the appropriate criminal court pursuant to subdivision three of this section, until the defendant is arraigned upon an accusatory instrument filed pursuant to section eight hundred thirteen of the family court act in such criminal court.

**3. The court may issue a temporary order of protection ex parte upon the filing of an accusatory instrument and for good**

**§ 530.12 Protection for victims of family offenses, NY CRIM PRO § 530.12**

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cause shown. When a family court order of protection is modified, the criminal court shall forward a copy of such modified order to the family court issuing the original order of protection; provided, however, that where a copy of the modified order is transmitted to the family court by facsimile or other electronic means, the original copy of such modified order and accompanying affidavit shall be forwarded immediately thereafter.

3-a. Emergency powers when family court not in session; issuance of temporary orders of protection. Upon the request of the petitioner, a local criminal court may on an ex parte basis issue a temporary order of protection pending a hearing in family court, provided that a sworn affidavit, verified in accordance with subdivision one of section 100.30 of this chapter, is submitted: (i) alleging that the family court is not in session; (ii) alleging that a family offense, as defined in subdivision one of section eight hundred twelve of the family court act and subdivision one of section 530.11 of this article, has been committed; (iii) alleging that a family offense petition has been filed or will be filed in family court on the next day the court is in session; and (iv) showing good cause. Upon appearance in a local criminal court, the petitioner shall be advised that he or she may continue with the proceeding either in family court or upon the filing of a local criminal court accusatory instrument in criminal court or both. Upon issuance of a temporary order of protection where petitioner requests that it be returnable in family court, the local criminal court shall transfer the matter forthwith to the family court and shall make the matter returnable in family court on the next day the family court is in session, or as soon thereafter as practicable, but in no event more than four calendar days after issuance of the order. The local criminal court, upon issuing a temporary order of protection returnable in family court pursuant to this subdivision, shall immediately forward, in a manner designed to insure arrival before the return date set in the order, a copy of the temporary order of protection and sworn affidavit to the family court and shall provide a copy of such temporary order of protection to the petitioner; provided, however, that where a copy of the temporary order of protection and affidavit are transmitted to the family court by facsimile or other electronic means, the original order and affidavit shall be forwarded to the family court immediately thereafter. Any temporary order of protection issued pursuant to this subdivision shall be issued to the respondent, and copies shall be filed as required in subdivisions six and eight of this section for orders of protection issued pursuant to this section. Any temporary order of protection issued pursuant to this subdivision shall plainly state the date that such order expires which, in the case of an order returnable in family court, shall be not more than four calendar days after its issuance, unless sooner vacated or modified by the family court. A petitioner requesting a temporary order of protection returnable in family court pursuant to this subdivision in a case in which a family court petition has not been filed shall be informed that such temporary order of protection shall expire as provided for herein, unless the petitioner files a petition pursuant to subdivision one of section eight hundred twenty-one of the family court act on or before the return date in family court and the family court issues a temporary order of protection or order of protection as authorized under article eight of the family court act. Nothing in this subdivision shall limit or restrict the petitioner's right to proceed directly and without court referral in either a criminal or family court, or both, as provided for in section one hundred fifteen of the family court act and section 100.07 of this chapter.

3-b. Emergency powers when family court not in session; modifications of orders of protection or temporary orders of protection. Upon the request of the petitioner, a local criminal court may on an ex parte basis modify a temporary order of protection or order of protection which has been issued under article four, five, six or eight of the family court act pending a hearing in family court, provided that a sworn affidavit verified in accordance with subdivision one of section 100.30 of this chapter is submitted: (i) alleging that the family court is not in session and (ii) showing good cause, including a showing that the existing order is insufficient for the purposes of protection of the petitioner, the petitioner's child or children or other members of the petitioner's family or household. The local criminal court shall make the matter regarding the modification of the order returnable in family court on the next day the family court is in session, or as soon thereafter as practicable, but in no event more than four calendar days after issuance of the modified order. The court shall immediately forward a copy of the modified order, if any, and sworn affidavit to the family court and shall provide a copy of such modified order, if any, and affidavit to the petitioner; provided, however, that where copies of such modified order and affidavit are transmitted to the family court by facsimile or other electronic means, the original copies of such modified order and affidavit shall be forwarded to the family court immediately thereafter. Any modified temporary order of protection or order of protection issued pursuant to this subdivision shall be issued to the respondent and copies shall be filed as required in subdivisions six and eight of this section for orders of protection issued pursuant to this section.

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4. The court may issue or extend a temporary order of protection ex parte or on notice simultaneously with the issuance of a warrant for the arrest of defendant. Such temporary order of protection may continue in effect until the day the defendant subsequently appears in court pursuant to such warrant or voluntarily or otherwise.

5. [Eff. until Sept. 1, 2017, pursuant to L.1995, c. 3, § 74, par. d. See, also, opening paragraph below.] Upon sentencing on a conviction for any crime or violation between spouses, between a parent and child, or between members of the same family or household as defined in subdivision one of section 530.11 of this article, the court may in addition to any other disposition, including a conditional discharge or youthful offender adjudication, enter an order of protection. Where a temporary order of protection was issued, the court shall state on the record the reasons for issuing or not issuing an order of protection. The duration of such an order shall be fixed by the court and: (A) in the case of a felony conviction, shall not exceed the greater of: (i) eight years from the date of such sentencing, except where the sentence is or includes a sentence of probation on a conviction for a felony sexual assault, as provided in subparagraph (iii) of paragraph (a) of subdivision three of section 65.00 of the penal law, in which case, ten years from the date of such sentencing, or (ii) eight years from the date of the expiration of the maximum term of an indeterminate or the term of a determinate sentence of imprisonment actually imposed; or (B) in the case of a conviction for a class A misdemeanor, shall not exceed the greater of: (i) five years from the date of such sentencing, except where the sentence is or includes a sentence of probation on a conviction for a misdemeanor sexual assault, as provided in subparagraph (ii) of paragraph (b) of subdivision three of section 65.00 of the penal law, in which case, six years from the date of such sentencing, or (ii) five years from the date of the expiration of the maximum term of a definite or intermittent term actually imposed; or (C) in the case of a conviction for any other offense, shall not exceed the greater of: (i) two years from the date of sentencing, or (ii) two years from the date of the expiration of the maximum term of a definite or intermittent term actually imposed. For purposes of determining the duration of an order of protection entered pursuant to this subdivision, a conviction shall be deemed to include a conviction that has been replaced by a youthful offender adjudication. In addition to any other conditions, such an order may require the defendant:

5. [Eff. Sept. 1, 2017, pursuant to L.1995, c. 3, § 74, par. d. See, also, opening paragraph above.] Upon sentencing on a conviction for any crime or violation between spouses, between a parent and child, or between members of the same family or household as defined in subdivision one of section 530.11 of this article, the court may in addition to any other disposition, including a conditional discharge or youthful offender adjudication, enter an order of protection. Where a temporary order of protection was issued, the court shall state on the record the reasons for issuing or not issuing an order of protection. The duration of such an order shall be fixed by the court and, in the case of a felony conviction, shall not exceed the greater of: (i) five years from the date of such sentencing, or (ii) three years from the date of the expiration of the maximum term of an indeterminate sentence of imprisonment actually imposed; or in the case of a conviction for a class A misdemeanor, shall not exceed three years from the date of such sentencing; or in the case of a conviction for any other offense, shall not exceed one year from the date of sentencing. For purposes of determining the duration of an order of protection entered pursuant to this subdivision, a conviction shall be deemed to include a conviction that has been replaced by a youthful offender adjudication. In addition to any other conditions, such an order may require the defendant :

(a) to stay away from the home, school, business or place of employment of the family or household member, the other spouse or the child, or of any witness designated by the court, provided that the court shall make a determination, and shall state such determination in a written decision or on the record, whether to impose a condition pursuant to this paragraph, provided further, however, that failure to make such a determination shall not affect the validity of such order of protection. In making such determination, the court shall consider, but shall not be limited to consideration of, whether the order of protection is likely to achieve its purpose in the absence of such a condition, conduct subject to prior orders of protection, prior incidents of abuse, extent of past or present injury, threats, drug or alcohol abuse, and access to weapons;

(b) to permit a parent, or a person entitled to visitation by a court order or a separation agreement, to visit the child at stated periods;

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(c) to refrain from committing a family offense, as defined in subdivision one of section 530.11 of this article, or any criminal offense against the child or against the family or household member or against any person to whom custody of the child is awarded, or from harassing, intimidating or threatening such persons; or

(d) to refrain from acts of commission or omission that create an unreasonable risk to the health, safety and welfare of a child, family or household member's life or health;

(e) to permit a designated party to enter the residence during a specified period of time in order to remove personal belongings not in issue in this proceeding or in any other proceeding or action under this chapter, the family court act or the domestic relations law.

6. An order of protection or a temporary order of protection issued pursuant to subdivision one, two, three, four or five of this section shall bear in a conspicuous manner the term "order of protection" or "temporary order of protection" as the case may be and a copy shall be filed by the clerk of the court with the sheriff's office in the county in which the complainant resides, or, if the complainant resides within a city, with the police department of such city. The order of protection or temporary order of protection shall also contain the following notice: "This order of protection will remain in effect even if the protected party has, or consents to have, contact or communication with the party against whom the order is issued. This order of protection can only be modified or terminated by the court. The protected party cannot be held to violate this order nor be arrested for violating this order." The absence of such language shall not affect the validity of such order. A copy of such order of protection or temporary order of protection may from time to time be filed by the clerk of the court with any other police department or sheriff's office having jurisdiction of the residence, work place, and school of anyone intended to be protected by such order. A copy of the order may also be filed by the complainant at the appropriate police department or sheriff's office having jurisdiction. Any subsequent amendment or revocation of such order shall be filed in the same manner as herein provided.

Such order of protection shall plainly state the date that such order expires.

6-a. The court shall inquire as to the existence of any other orders of protection between the defendant and the person or persons for whom the order of protection is sought.

7. A family offense subject to the provisions of this section which occurs subsequent to the issuance of an order of protection under this chapter shall be deemed a new offense for which the complainant may seek to file a new accusatory instrument and may file a family court petition under article eight of the family court act as provided for in section 100.07 of this chapter.

8. In any proceeding in which an order of protection or temporary order of protection or a warrant has been issued under this section, the clerk of the court shall issue to the complainant and defendant and defense counsel and to any other person affected by the order a copy of the order of protection or temporary order of protection and ensure that a copy of the order of protection or temporary order of protection be transmitted to the local correctional facility where the individual is or will be detained, the state or local correctional facility where the individual is or will be imprisoned, and the supervising probation

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department or department of corrections and community supervision where the individual is under probation or parole supervision. The presentation of a copy of such order or a warrant to any peace officer acting pursuant to his or her special duties or police officer shall constitute authority for him or her to arrest a person who has violated the terms of such order and bring such person before the court and, otherwise, so far as lies within his or her power, to aid in securing the protection such order was intended to afford. The protected party in whose favor the order of protection or temporary order of protection is issued may not be held to violate an order issued in his or her favor nor may such protected party be arrested for violating such order.

9. If no warrant, order or temporary order of protection has been issued by the court, and an act alleged to be a family offense as defined in section 530.11 of this chapter is the basis of the arrest, the magistrate shall permit the complainant to file a petition, information or accusatory instrument and for reasonable cause shown, shall thereupon hold such respondent or defendant, admit to, fix or accept bail, or parole him or her for hearing before the family court or appropriate criminal court as the complainant shall choose in accordance with the provisions of section 530.11 of this chapter.

10. Punishment for contempt based on a violation of an order of protection or temporary order of protection shall not affect the original criminal action, nor reduce or diminish a sentence upon conviction for the original crime or violation alleged therein or for a lesser included offense thereof.

11. If a defendant is brought before the court for failure to obey any lawful order issued under this section, or an order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction, and if, after hearing, the court is satisfied by competent proof that the defendant has willfully failed to obey any such order, the court may:

(a) revoke an order of recognizance or revoke an order of bail or order forfeiture of such bail and commit the defendant to custody; or

(b) restore the case to the calendar when there has been an adjournment in contemplation of dismissal and commit the defendant to custody; or

(c) revoke a conditional discharge in accordance with section 410.70 of this chapter and impose probation supervision or impose a sentence of imprisonment in accordance with the penal law based on the original conviction; or

(d) revoke probation in accordance with section 410.70 of this chapter and impose a sentence of imprisonment in accordance with the penal law based on the original conviction. In addition, if the act which constitutes the violation of the order of protection or temporary order of protection is a crime or a violation the defendant may be charged with and tried for that crime or violation.

*(e) Repealed.*

**§ 530.12 Protection for victims of family offenses, NY CRIM PRO § 530.12**

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12. The chief administrator of the courts shall promulgate appropriate uniform temporary orders of protection and orders of protection forms to be used throughout the state. Such forms shall be promulgated and developed in a manner to ensure the compatibility<sup>1</sup> of such forms with the statewide computerized registry established pursuant to section two hundred twenty-one-a of the executive law.

13. Notwithstanding the foregoing provisions, an order of protection, or temporary order of protection when applicable, may be entered against a former spouse and persons who have a child in common, regardless of whether such persons have been married or have lived together at any time, or against a member of the same family or household as defined in subdivision one of section 530.11 of this article.

14. The people shall make reasonable efforts to notify the complainant alleging a crime constituting a family offense when the people have decided to decline prosecution of such crime, to dismiss the criminal charges against the defendant or to enter into a plea agreement. The people shall advise the complainant of the right to file a petition in the family court pursuant to section 100.07 of this chapter and section one hundred fifteen of the family court act.

In any case where allegations of criminal conduct are transferred from the family court to the criminal court pursuant to paragraph (ii) of subdivision (b) of section eight hundred forty-six of the family court act, the people shall advise the family court making the transfer of any decision to file an accusatory instrument against the family court respondent and shall notify such court of the disposition of such instrument and the sentence, if any, imposed upon such respondent.

Release of a defendant from custody shall not be delayed because of the requirements of this subdivision.

15. Any motion to vacate or modify an order of protection or temporary order of protection shall be on notice to the non-moving party, except as provided in subdivision three-b of this section.

**Credits**

(Formerly § 530.11, added L.1977, c. 449, § 11. Amended L.1978, c. 628, §§ 10, 11; L.1978, c. 629, § 5. Renumbered § 530.12 and amended L.1980, c. 530, § 14. Amended L.1981, c. 143, § 1; L.1981, c. 416, §§ 21, 22; L.1982, c. 516, § 4; L.1984, c. 388, § 1; L.1984, c. 948, § 14; L.1985, c. 672, § 3; L.1986, c. 620, § 1; L.1986, c. 794, § 1; L.1988, c. 702, § 1; L.1989, c. 164, § 2; L.1990, c. 454, § 1; L.1993, c. 498, § 4; L.1994, c. 222, §§ 40 to 45; L.1994, c. 224, §§ 8, 14; L.1995, c. 3, § 36; L.1995, c. 483, §§ 15, 16; L.1996, c. 511, § 2; L.1996, c. 644, §§ 1, 2; L.1997, c. 186, §§ 10 to 12, eff. July 8, 1997; L.1997, c. 589, § 1, eff. Sept. 17, 1997; L.1998, c. 610, § 1, eff. Oct. 6, 1998; L.1998, c. 597, § 12, eff. Dec. 22, 1998; L.2001, c. 384, § 1, eff. Nov. 1, 2001; L.2001, c. 384, § 2; L.2006, c. 215, § 1, eff. Aug. 25, 2006; L.2006, c. 253, § 8, eff. July 26, 2006; L.2007, c. 73, § 2, eff. Oct. 1, 2007; L.2007, c. 137, § 1, eff. July 3, 2007; L.2008, c. 56, pt. D, § 5, eff. April 23, 2008; L.2008, c. 326, § 12, eff. July 21, 2008; L.2009, c. 476, § 12, eff. Dec. 15, 2009; L.2011, c. 9, § 1, eff. May 13, 2011; L.2011, c. 9, § 2; L.2011, c. 62, pt. C, subpt. B, § 81, eff. March 31, 2011; L.2013, c. 480, § 13; L.2013, c. 526, § 11, eff. Dec. 18, 2013; L.2015, c. 240, § 1, eff. Oct. 22, 2015.)

**Editors' Notes**

**SUPPLEMENTARY PRACTICE COMMENTARY**

**§ 530.12 Protection for victims of family offenses, NY CRIM PRO § 530.12**

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by William C. Donnino

**2013-2015**

**Identification Documents**

In late 2013, this statute defining the contents of an “order of protection” was amended to include the return of “identification documents” to the person in whose favor the order was issued. L. 2013, c. 526 (Assembly Bill 7400), effective December 18, 2013.

A court is permitted to make appropriate provisions for identification documents which are evidence in the pending action, or which are necessary for the legitimate use of the person against whom the order was issued.

Some documents used to access bank, credit and/or other financial records, particularly those involving joint use or ownership, require a “motion,” “notice,” an “opportunity to be heard” and a court determination that such identifying documents “are necessary and are appropriately transferred” to the protected party.

According to the Legislative Memorandum: “by specifically permitting the return of documents to victims of abuse this proposal will help provide meaningful relief to overcome some of the barriers to economic self-sufficiency imposed by the abuser.”

**Expanded Protection**

In 2013 (c. 480) CPL 140.05 and 530.12 were amended to preclude liability and arrest for a violation of an order of protection by the person in whose favor the order was issued, and a provision was added to require that the order of protection include a notice that the order can only be modified or terminated by the court, and that the party in whose favor the order was issued is not liable or subject to arrest for a violation of the order. According to the Legislative Memorandum, the legislation was a reaction to a finding that “[i]f victims have or consent to have contact with their abusers in any way, or if the abusers are back in the home despite the direction to stay away from their victim ... the victims are being arrested and prosecuted for violating the terms of their own order of protection, contacting their abuser or aiding and abetting the abuser to violate their own protective order.”

To help put the parties on notice of the ramifications of an order of protection, the legislation requires that the order contain a notice that:

“This order of protection will remain in effect even if the protected party has, or consents to have, contact or communication with the party against whom the order is issued. This order of protection can only be modified or terminated by the court. The protected party cannot be held to violate this order nor be arrested for violating this order.” CPL 530.12(6). *See also* CPL 140.10(4).

**Period for Sex Offenders on Probation**

**§ 530.12 Protection for victims of family offenses, NY CRIM PRO § 530.12**

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In 2015, the Legislature decided to make the authorized period for an “order of protection” equal to any period of probation imposed at the same time on a person convicted of a “sexual assault” [defined in Penal Law § 65.00(3)]. L.2015, c. 240.

For a person who is convicted of a felony “sexual assault” and the sentence is or includes probation, “the period of probation shall be ten years.” [Penal Law § 65.00(3)(a)(iii)]. For a person who is convicted of a class A misdemeanor “sexual assault” and the sentence is or includes probation, “the period of probation shall be six years.” [Penal Law § 65.00(3)(b)(ii)].

Prior to the 2015 legislation, the period for an “order of protection” issued to such individuals was eight years for a felony “sexual assault” and five years for a class A misdemeanor “sexual assault.” The legislation extended the authorized periods of any such “order of protection” from eight to ten years from the date of sentence for a felony “sexual assault,” and from five to six years from the date of sentence upon conviction of a misdemeanor “sexual assault.” CPL 530.12(5) and 530.13(4). Thus this legislation provided that the extended periods “shall apply to offenses committed on or after [the] effective date,” October 22, 2015. L.2015, c. 240 , § 3.

**Calculation of Period**

Subdivision five of this section specifies in part that when a determinate sentence of imprisonment is actually imposed and an order of protection is issued, the duration of the order of protection “shall not exceed ... (ii) eight years from the date of the expiration of the maximum term of ... a determinate sentence of imprisonment actually imposed.” In calculating the “term” of the determinate sentence, the Court of Appeals, in interpreting the identical provision in CPL 530.13(4), held that the determinate sentence’s period of imprisonment and period of post-release supervision must be added together. *See People v. Williams*, 19 N.Y.3d 100, 945 N.Y.S.2d 629, 968 N.E.2d 983 (2012).

*by Peter Preiser*

**2011**

Subdivision five of this section was amended in 2011 to change the requirement for entering final orders of protection from date of conviction to date of imposition of sentence and the limitation on the length of that order to span from the date of sentencing rather than the date of conviction. This simply corrects an anomaly as the victim was covered by the temporary order of protection during the pendency of the criminal proceeding, which lasted up to the date of sentencing.

A similar change was made to subdivision four of section 530.13.

**PRACTICE COMMENTARIES**

*by Peter Preiser*

**§ 530.12 Protection for victims of family offenses, NY CRIM PRO § 530.12**

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The genesis of this section is outlined in the practice commentaries for the comprehensive criminal court family offense jurisdiction section (see CPL § 530.11), and the two sections should be construed together. Indeed, in many cases when amendments are made to one of the two sections, a complementary amendment is made to the other. As is the case with CPL § 530.11, this section is comprised of a patchwork of amendments and duplications caused by legislation virtually every year since its enactment, including the latest to the 2008 legislative session.

These provisions appropriately were inserted in an article that deals with securing orders so that courts will consider the immediate need for protection of a family offense complainant from abuse by persons closely associated as members of the same family or household when defendant first appears in the court for arraignment. Thus, the statute provides in subdivision one that the court is to consider issuance of an order of protection in conjunction with a securing order that it must issue upon a finding of probable cause. (see CPL §§ 170.10[7], 530.20).

In summary, this section supplements the jurisdictional section by granting a criminal court broad authority to issue, continue and/or modify orders of protection in the family offenses for which it has concurrent jurisdiction with the Family Court. These comprise certain specifically designated offenses occurring between spouses or former spouses, parent and child, or members of the same family or household as that rather broad term is defined in subdivision one of CPL § 530.11.

This section also provides authority for immediate protection in cases where the Family Court is not available. Thus, if the victim of a family offense would rather proceed without making a criminal charge, a criminal court may issue a temporary order of protection pending a hearing in the Family Court (subd. 3-a), or upon request of a Family Court petitioner when that court is not in session modify orders of protection issued by that Court (subd. 3-b). Additionally, the jurisdictional section, CPL § 530.11[4], authorizes local criminal courts to receive persons arrested on Supreme Court or Family Court warrants when those courts are not in session and to deal with them pursuant to specified statutory authority set forth in the Family Court Act and the Domestic Relations law.

The authority for a criminal court to issue its own order of protection in family offense cases is set forth in subdivisions one, three, four and five. Subdivision one authorizes a temporary order of protection upon arraignment of the defendant. Subdivisions three and four authorize *ex parte* temporary orders of protection, and under subdivision five the court may issue a non-temporary order of protection covering a span of years when defendant is convicted of a crime. Subdivision two provides that a Family Court order of protection remains in effect when a respondent appears in the criminal court and as above noted subdivisions 3-a and 3-b permit a criminal court to issue and/or modify Family Court orders of protection when that court is not in session. The comprehensive scope of the restrictions that may be imposed upon a defendant by an order of protection is spelled out in subdivision one. To be certain that the scope is covered and the restrictions specific, courts customarily utilize a preprinted form with boxes on which check marks may be inserted to prescribe the restrictions for individual cases (see *e.g.*, 22 NYCRR subd. D, Ch. III, Subch. C).

In addition to the restrictions pursuant to the order of protection, the order of protection may require defendant to surrender and turn in any and all firearms, including rifles and shotguns. Moreover, in certain situations the court has discretionary authority or is required to declare defendant ineligible for a license to possess a firearm (CPL § 530.14, Penal Law § 400.00[1], [11]). Apart from restrictions upon the defendant, by recent amendment the court has authority to permit a victim to avoid future liability under the obligations of a lease or rental agreement (see par. g).

An order of protection must state the date on which it expires and copies must be filed with the clerk of the court

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**§ 530.12 Protection for victims of family offenses, NY CRIM PRO § 530.12**


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and the local police agencies as well as delivered to the defendant, defense counsel and any other person affected. The date is important because a willful violation of an order may be prosecuted as a criminal contempt under the judiciary law (§ 751) or as a class A misdemeanor under the Penal Law (§ 215.50[3]). Under certain circumstances a willful violation may be punishable as a class E felony. Note too that multiple willful violations may be punished separately and consecutive sentences may be imposed (see *Walker v. Walker*, 1995, 86 N.Y.2d 624, 635 N.Y.S.2d 152, 658 N.E.2d 1025). Although the statute expressly permits some orders to be issued *ex parte*, a defendant cannot be held responsible for willful violation absent proof that he or she has been informed both of the existence of the order and of the provision allegedly violated. *People v. Inserra*, 2004, 4 N.Y.3d 30, 790 N.Y.S.2d 72, 823 N.E.2d 437; see *People v. McCowan*, 1995, 85 N.Y.2d 985, 629 N.Y.S.2d 163, 652 N.E.2d 909. Presumably, where the order is issued *ex parte* upon issuance of a warrant of arrest to continue in effect until defendant appears in court, notice will occur when it is served along with the warrant and expiration can be established by records showing the date of defendant's appearance (but see *People v. Prescott*, 115 Misc.3d 1122(A), 839 N.Y.S.2d 436 [Sup Ct. NY Co. 2007]).

Apart from contempt of court, if the defendant commits some other offense, such as assault, whether before or after the contempt, a separate prosecution and punishment for that offense may ensue as well (see subds. 7, 10, 11[d]). In addition to direct punishment, upon willful violation of an order of protection pending final disposition of a family offense, the court may revoke an order of recognizance or bail and commit the defendant to custody (subd. 11[a], [b]). This constitutes an exception to the general requirement that a court must order recognizance or bail where a defendant is charged with an offense below felony grade (see CPL § 530.20[1] and Practice Commentaries thereto). Alternatively, in cases where defendant is currently under sentence for a prior crime, the court may revoke conditional discharge and impose probation supervision or revoke probation and sentence defendant to jail where permitted by the penal law (subd. 11[c], [d]).

Subdivision five deals with orders of protection upon conviction of the defendant for a family offense. At this point the court is required to determine whether a temporary order has been issued and, if so, explain the reasons for issuing or not issuing a "permanent" order when imposing the sentence. Upon determining that an order of protection is needed at sentencing, the court may impose an order covering a period of time that may extend in the case of a felony for as long as eight years from the date of conviction or alternatively from expiration of the term of imprisonment imposed. In other cases the maximum duration shall be five years from the date of conviction for a class A misdemeanor or two years for a lesser offense. When sentence has been imposed, the clerk of the court is required to transmit a copy of the order to the correctional facility or the parole or probation agency that is to receive custody or jurisdiction. In addition, the court may, or in certain circumstances must, order defendant to surrender any and all firearms and declare defendant ineligible for a license to possess a firearm (see CPL 530.14). A permanent order of protection is deemed part of the judgment of conviction and is appealable in the same fashion as any other aspect of the judgment. Note though that the order, though part of the judgment, is not considered a part of the sentence and thus an irregularity in the order is not a jurisdictional defect that invalidates it. Accordingly, preservation of an objection is required for raising errors on appeal. *People v. Whalen*, 49 A.D.3d 916, 917 n.1, 852 N.Y.S.2d 482 (3d Dept. 2008); *cf.*, *People v. Nieves*, 2004, 2 N.Y.3d 310, 778 N.Y.S.2d 751, 811 N.E.2d 13.

Due to the fact that a defendant may be subject to two convictions, either through dual jurisdiction of both a criminal court and the family court, or because of exposure to punishment for both willful violation of an order of protection (contempt) and the crime that served as a basis for the violation (*e.g.*, assault), double jeopardy issues may arise. Since a victim of a family offense has the right to proceed against a defendant in both a criminal court and the Family Court, there is a possibility that the same conduct could simultaneously be a willful violation of the orders of both courts. In such case punishment for contempt by either court would be deemed to preclude punishment for contempt by the other, if based upon the same conduct, irrespective of which court imposed the punishment first. *People v. Wood*, 2000, 95 N.Y.2d 509, 719 N.Y.S.2d 639, 742 N.E.2d 114. However, where the contempt is based upon a substantive crime committed against the victim, the defendant may be punished separately for contempt in violating the order of the court and also for the crime committed against the victim. In

**§ 530.12 Protection for victims of family offenses, NY CRIM PRO § 530.12**

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such case double jeopardy does not apply, because the crime of willful violation of the order is not one of the elements of the statute violated by the defendant (see Practice Commentaries for CPL § 40.20); but if the criminal conduct were the basis for violation of the order of protection, the sentences cannot be consecutive (see Penal Law § 70.25[2]).

Notes of Decisions (47)

**Footnotes**

1  
So in original. Probably should be “compatibility”.

McKinney’s CPL § 530.12, NY CRIM PRO § 530.12  
Current through L.2016, chapters 1 to 422.

End of Document

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ORI No: \_\_\_\_\_  
Order No: \_\_\_\_\_

At a term of the \_\_\_\_\_ Court, County of \_\_\_\_\_,  
at the Courthouse at \_\_\_\_\_, State of New York

NYSID No: \_\_\_\_\_  
CJTN No. \_\_\_\_\_

**ORDER OF PROTECTION**  
**Family Offenses - C.P.L. 530.12**

**PRESENT: Hon.** \_\_\_\_\_,  
**PEOPLE OF THE STATE OF NEW YORK**

Youthful Offender (check if applicable)  
Part: \_\_\_\_\_ Index/Docket No: \_\_\_\_\_  
Indictment No., if any: \_\_\_\_\_  
Charges: \_\_\_\_\_

\_\_\_\_\_ against

[Check box]:  Ex Parte  Defendant Present In Court

\_\_\_\_\_, Defendant Date of Birth: \_\_\_\_\_

**NOTICE: YOUR FAILURE TO OBEY THIS ORDER MAY SUBJECT YOU TO MANDATORY ARREST AND CRIMINAL PROSECUTION WHICH MAY RESULT IN YOUR INCARCERATION FOR UP TO SEVEN YEARS FOR CONTEMPT OF COURT. IF THIS IS A TEMPORARY ORDER OF PROTECTION AND YOU FAIL TO APPEAR IN COURT WHEN YOU ARE REQUIRED TO DO SO, THIS ORDER MAY BE EXTENDED IN YOUR ABSENCE AND THEN CONTINUES IN EFFECT UNTIL A NEW DATE SET BY THE COURT.**

**THIS ORDER OF PROTECTION WILL REMAIN IN EFFECT EVEN IF THE PROTECTED PARTY HAS, OR CONSENTS TO HAVE, CONTACT OR COMMUNICATION WITH THE PARTY AGAINST WHOM THE ORDER IS ISSUED. THIS ORDER OF PROTECTION CAN ONLY BE MODIFIED OR TERMINATED BY THE COURT. THE PROTECTED PARTY CANNOT BE HELD TO VIOLATE THIS ORDER NOR BE ARRESTED FOR VIOLATING THIS ORDER.**

- TEMPORARY ORDER OF PROTECTION** - Whereas good cause has been shown for the issuance of a temporary order of protection [as a condition of  recognizance  release on bail  adjournment in contemplation of dismissal]
- ORDER OF PROTECTION** - Whereas defendant has been convicted of [specify crime or violation]: \_\_\_\_\_;  
And the Court having made a determination in accordance with section 530.12 of the Criminal Procedure Law,

**IT IS HEREBY ORDERED that the above-named defendant observe the following conditions of behavior:**

**[Check applicable paragraphs and subparagraphs]:**

- [01]  Stay away from [A]  [name(s) of protected person(s) or witness(es)]: \_\_\_\_\_ and/or from the  
[B]  home of \_\_\_\_\_, [C]  school of \_\_\_\_\_,  
[D]  business of \_\_\_\_\_, [E]  place of employment of \_\_\_\_\_,  
[F]  other \_\_\_\_\_;  
-  except for contact, communication or access permitted by a subsequent order issued by a family or supreme court in a custody, visitation or child abuse or neglect proceeding.
- [14]  Refrain from communication or any other contact by mail, telephone, e-mail, voice-mail or other electronic or any other means with [specify protected person(s)]: \_\_\_\_\_;  
-  except for contact, communication or access permitted by a subsequent order issued by a family or supreme court in a custody, visitation or child abuse or neglect proceeding.
- [02]  Refrain from assault, stalking, harassment, aggravated harassment, menacing, reckless endangerment, strangulation, criminal obstruction of breathing or circulation, disorderly conduct, criminal mischief, sexual abuse, sexual misconduct, forcible touching, intimidation, threats, identity theft, grand larceny, coercion or any criminal offense against [specify protected person(s), members of such person's family or household, or person(s) with custody of child(ren)]: \_\_\_\_\_;
- [15]  Refrain from intentionally injuring or killing without justification the following companion animal(s) (pet(s)) [specify type(s) and, if available, name(s)]: \_\_\_\_\_;
- [11]  Permit [specify individual]: \_\_\_\_\_ to enter the residence at [specify ]: \_\_\_\_\_ during [specify date/time]: \_\_\_\_\_ with [specify law enforcement agency, if any]: \_\_\_\_\_ to remove personal belongings not in issue in litigation [specify items]: \_\_\_\_\_;
- [04]  Refrain from [indicate acts]: \_\_\_\_\_ that create an unreasonable risk to the health, safety, or welfare of [specify child(ren), family or household member]: \_\_\_\_\_;

[05]  Permit [specify individual(s)]: \_\_\_\_\_, entitled by a court order or separation or other written agreement, to visit with [specify child(ren)]: \_\_\_\_\_ during the following periods of time [specify]: \_\_\_\_\_, under the following terms and conditions [specify]: \_\_\_\_\_;

[12]  Surrender any and all handguns, pistols, revolvers, rifles, shotguns and other firearms owned or possessed, including, but not limited to, the following \_\_\_\_\_ and do not obtain any further guns or other firearms. Such surrender shall take place immediately, but in no event later than [specify date/time]: \_\_\_\_\_ at: \_\_\_\_\_.

[ ]  Promptly return or transfer the following identification documents [specify]: \_\_\_\_\_ to the party protected by this Order NOT LATER THAN [specify date]: \_\_\_\_\_ in the following manner [specify manner or mode of return or transfer]: \_\_\_\_\_.  
[Check box(es) if applicable]:  Such documents shall be made available for use as evidence in this judicial proceeding.  [Jointly owned documents or documents in both parties' names only]: the following document(s) may be used as necessary for legitimate use by the defendant [specify]: \_\_\_\_\_.

[99]  Specify other conditions defendant must observe for the purposes of protection: \_\_\_\_\_

**IT IS FURTHER ORDERED** that the above-named Defendant's license to carry, possess, repair, sell or otherwise dispose of a firearm or firearms, if any, pursuant to Penal Law §400.00, is hereby [ 13A]  suspended or [13B]  revoked (note: final order only), and/or [13C]  the Defendant shall remain ineligible to receive a firearm license during the period of this order. (Check all applicable boxes).

**IT IS FURTHER ORDERED** that this order of protection shall remain in force until and including [specify date]: \_\_\_\_\_, but if you fail to appear when you are required to do so, the order may be extended and continue in effect until a new date set by the Court.

**DATED:** \_\_\_\_\_

\_\_\_\_\_  
JUDGE / JUSTICE  
Court (Court Seal)

- Defendant advised in Court of issuance and contents of Order.
- Order personally served on Defendant in Court

\_\_\_\_\_  
(Defendant's signature)

- Order to be served by other means [specify]: \_\_\_\_\_
- Warrant issued for Defendant
- ADDITIONAL SERVICE INFORMATION: [specify]: \_\_\_\_\_

**The Criminal Procedure Law provides** that presentation of a copy of this order of protection to any police officer or peace officer acting pursuant to his or her special duties shall authorize and in some situations may require, such officer to arrest a defendant who is alleged to have violated its terms and to bring him or her before the Court to face penalties authorized by law.

**Federal law requires** that this order be honored and enforced by state and tribal courts, including courts of a state, the District of Columbia, a commonwealth, territory or possession of the United States, if the person against whom the order is sought is an intimate partner of the protected party and has been or will be afforded reasonable notice and opportunity to be heard in accordance with state law sufficient to protect that person's rights (18 USC §§2265, 2266).

**It is a federal crime to:**

- cross state lines to violate this order or to stalk, harass or commit domestic violence against an intimate partner or family member;
- buy, possess or transfer a handgun, rifle, shotgun or other firearm or ammunition while this Order remains in effect (Note: there is a limited exception for military or law enforcement officers but only while they are on duty); and
- buy, possess or transfer a handgun, rifle, shotgun or other firearm or ammunition after a conviction of a domestic violence-related crime involving the use or attempted use of physical force or a deadly weapon against an intimate partner or family member, even after this Order has expired. (18 U.S.C. §§922(g)(8), 922(g)(9), 2261, 2261A, 2262).

# New York State Standardized DOMESTIC INCIDENT REPORT (DIR)

(Form 3221-03/2016)

**REMEMBER: Whenever possible, ask complainant the DIR questions OUT of earshot and eyesight of suspect**

## TIPS FOR COMPLETION

When completing the DIR please be sure:

- To print legibly and firmly
- Wraparound cover is in place
- All copies of each page are lined up properly
- Writing is visible on all 3 copies of the form
- To complete every section of the DIR
- To hand Victim Rights Notice to the victim
- Victim understands the Victim Rights Notice
- Victim receives all pink copies at the scene

## **WHERE TO SEND DIR FORMS**

**New York City (NYC)** DIR forms are sent to NYPD and do not need to be sent directly to DCJS.

**State Police** forward DCJS copies of DIR to Zone Headquarters.

**All Other Agencies**, send DCJS copies of DIR to:  
NYS Division of Criminal Justice Services  
NYS Identification Bureau-DIR, 5th Floor  
80 South Swan Street  
Albany, New York 12210

**If Suspect is on Probation or Parole Supervision**, photocopy the police copy of DIR and send to the County Probation Department or the local Parole Office.

Addresses for County Probation Departments and Parole Offices can be found in the Criminal Justice Directory at: <http://criminaljustice.ny.gov>

## **HOW TO REQUEST MORE DIR FORMS**

To order additional forms send an email to:

**[dcjs.dl.dirform@dcjs.ny.gov](mailto:dcjs.dl.dirform@dcjs.ny.gov)**

When ordering forms, please provide the **agency name** and **street address** for shipment, no P.O. Boxes accepted. DIR forms come 25 forms to a pad. Please base your order on the **number of pads** needed, not the number of forms.

## **IMPORTANT HOTLINE NUMBERS**

NYS Domestic and Sexual Violence 1-800-942-6906  
Child Protective Services (Public) 1-800-342-3720  
CPS (Mandated Reporter) 1-800-635-1522  
Adult Protective Services 1-800-342-3009 (Option 6)

Local Service

Provider Name: \_\_\_\_\_

Hotline: \_\_\_\_\_

## Quick Reference Guide

Recommended Wording

**(PRIOR DV HISTORY?)** "Has \_\_\_\_\_ ever hurt you, threatened harm to you or others, made you afraid, or forced you to do something that you didn't want to do (prior to this incident)?"

**(VICTIM FEARFUL?)** "Are you currently concerned or in fear for your safety or the safety of someone else because of \_\_\_\_\_'s behavior?" **(Note: Document specific fear and reasons for it. Fear may be an element of an offense (e.g. menacing, coercion, stalking, etc.). Also, document in statement of allegations.**

**INFORM VICTIM.** "A *victim advocate can help you with SAFETY PLANNING, an important issue to be discussed with a local service provider. On the back of a form that I will give you are some phone numbers that can assist you. Do you need assistance with making arrangements for transportation to another location?*" **Note:** CPL 530.11(6) requires a police officer to advise a victim of local available services.)

**Officers are NOT required to arrest each person in dual complaint situations.**

Officers must identify the **PRIMARY PHYSICAL AGGRESSOR**. Consider injuries, threats of past and future harm, history of domestic violence, and self-defense responses. An **ARREST DECISION** shall NOT be based on the willingness of a person to testify or participate in a judicial proceeding (refer to the *Primary/Dominant Aggressor Law, (CPL 140.10 (4)(c))*).

Below is a list of some frequently seen offenses in domestic violence incidents.

**REMEMBER** to CHARGE all relevant offenses and charge at the highest degree appropriate for the circumstances.

### Family Offenses

(refer to CPL articles 140 and 530.11)

**Aggravated Family Offense** (240.75; E Felony)

**Aggravated Harassment 2<sup>nd</sup>** (240.30; A Misd.)

**Assault 2<sup>nd</sup>** (120.05; D Felony)

**Assault 3<sup>rd</sup>** (120.00; A Misdemeanor)

**Attempted Assault** (110.00)

**Criminal Mischief 1<sup>st</sup>** (145.12; B Felony)

**Criminal Mischief 2<sup>nd</sup>** (145.10; D Felony)

**Criminal Mischief 3<sup>rd</sup>** (145.05; E Felony)

**Criminal Mischief 4<sup>th</sup>** (145.00; A Misdemeanor)

**Disorderly Conduct** (240.20; Violation)

**Forcible Touching** (130.52; A Misdemeanor)

**Harassment 1<sup>st</sup>** (240.25; B Misdemeanor)

**Harassment 2<sup>nd</sup>** (240.26; Violation)

**Menacing 2<sup>nd</sup>** (120.14; A Misdemeanor)

**Menacing 3<sup>rd</sup>** (120.15; B Misdemeanor)

**Reckless Endangerment 1<sup>st</sup>** (120.25; D Felony)

**Reckless Endangerment 2<sup>nd</sup>** (120.20; A Misd.)

**Sexual Abuse 2<sup>nd</sup>** (130.60(1); A Misdemeanor)

**Sexual Abuse 3<sup>rd</sup>** (130.55; B Misdemeanor)

**Sexual Misconduct** (130.20; A Misd.)

**Stalking 1<sup>st</sup>** (120.60; D Felony)

**Stalking 2<sup>nd</sup>** (120.55; E Felony)

**Stalking 3<sup>rd</sup>** (120.50; A Misdemeanor)

**Stalking 4<sup>th</sup>** (120.45; B Misdemeanor)

**Criminal Obstruction of Breathing or Blood Circulation** (121.11; A Misd.)

**Strangulation 1<sup>st</sup>** (121.13; C Felony)

**Strangulation 2<sup>nd</sup>** (121.12; D Felony)

**Coercion 2<sup>nd</sup>** (135.60(1) (2) (3); A Misd.)

**Grand Larceny 3<sup>rd</sup>** (155.35; D Felony)

**Grand Larceny 4<sup>th</sup>** (155.30; E Felony)

**Identity Theft 1<sup>st</sup>** (190.80; D Felony)

**Identity Theft 2<sup>nd</sup>** (190.79; E Felony)

**Identity Theft 3<sup>rd</sup>** (190.78; A Misdemeanor)

### Often Committed Offenses

Agg. Assault Person under 11 (120.12; E Felony)

Agg. Criminal Contempt (215.52; D Felony)

Agg. Harassment 1<sup>st</sup> (240.31; E Felony)

Aggravated Cruelty to Animals (NY Agg. & M Section 353-a; Felony)

Assault 1<sup>st</sup> (120.10; B Felony)

Burglary 1<sup>st</sup> (140.30; B Felony)

" 2<sup>nd</sup> (140.25; C Felony)

" 3<sup>rd</sup> (140.20; D Felony)

Robbery 1<sup>st</sup> (160.15; B Felony)

" 2<sup>nd</sup> (160.10; C Felony)

Coercion 1<sup>st</sup> (135.65; D Felony)

Criminal Contempt 1<sup>st</sup> (215.51; E Felony)

" 2<sup>nd</sup> (215.50; A Misdemeanor)

Criminal Trespass 1<sup>st</sup> (140.17; D Felony)

" 2<sup>nd</sup> (140.15; A Misdemeanor)

" 3<sup>rd</sup> (140.10; B Misdemeanor)

Endangering Welfare of Child (260.10; A Misd.)

Endang. Welf. of Vulnerable Elderly Person 1st

(260.34; D Felony)

Intimidating Victim or Witness 1<sup>st</sup>

(215.17; B Felony)

Intimidating Victim or Witness 2<sup>nd</sup>

(215.16; D Felony)

Intimidating Victim or Witness 3<sup>rd</sup>

(215.15; E Felony)

Menacing 1<sup>st</sup> (120.13; E Felony)

Manslaughter 1<sup>st</sup> (125.20; B Felony)

Manslaughter 2<sup>nd</sup> (125.15; C Felony)

Murder 1<sup>st</sup> (125.27; A-I Felony)

Murder 2<sup>nd</sup> (125.25; A-I Felony)

Resisting Arrest (205.30; A Misdemeanor)

Unlawful Imprisonment 1<sup>st</sup> (135.10; E Felony)

" 2<sup>nd</sup> (135.05; A Misd.)

### Other Possible Offenses

Aggravated Sexual Abuse 1<sup>st</sup> (130.70; B Felony)

" 2<sup>nd</sup> (130.67; C Felony)

" 3<sup>rd</sup> (130.66; D Felony)

" 4<sup>th</sup> (130.65-a; E Felony)

Computer Tampering 1<sup>st</sup> (156.27; C Felony)

" 2<sup>nd</sup> (156.26; D Felony)

" 3<sup>rd</sup> (156.25; E Felony)

" 4<sup>th</sup> (156.20; A Misdemeanor)

Computer Trespass (156.10; E Felony)

Criminal Possession of a Dangerous Weapon 1<sup>st</sup> (265.04; B Felony)

Criminal Possession of a Weapon

2<sup>nd</sup> (265.03; C Felony)

" 3<sup>rd</sup> (265.02; D Felony)

" 4<sup>th</sup> (265.01; A Misd.)

Criminal Sexual Act 1<sup>st</sup> (130.50; B Felony)

" 2<sup>nd</sup> (130.45; D Felony)

" 3<sup>rd</sup> (130.40; E Felony)

Criminal Tampering 1<sup>st</sup> (145.20; D Felony)

" 2<sup>nd</sup> (145.15; A Misdemeanor)

" 3<sup>rd</sup> (145.14; B Misdemeanor)

Criminal Use of a Firearm 1<sup>st</sup> (265.09; B Felony)

" 2<sup>nd</sup> (265.08; A Misd.)

Criminally Negligent Homicide (125.10; E Felony)

Endang. Welf. Vulner. Elderly 2<sup>nd</sup> (260.32; E Fel)

Facil. a Sex Off. W. a Cont. Sub. (130.90; D Fel)

Kidnapping 1<sup>st</sup> (135.25; A-I Felony)

" 2<sup>nd</sup> (135.20; B Felony)

Rape 1<sup>st</sup> (130.35; B Felony)

" 2<sup>nd</sup> (130.30; D Felony)

" 3<sup>rd</sup> (130.25; E Felony)

Reckless Endanger. of Property (145.25; B Misd.)

Sexual Abuse 1<sup>st</sup> (130.65; D Felony)

Tampering with a Witness 1<sup>st</sup> (215.13; B Felony)

" 2<sup>nd</sup> (215.12; D Felony)

" 3<sup>rd</sup> (215.11; E Felony)

" 4<sup>th</sup> (215.10; A Misd.)

Unauth. Use of a Vehicle 1<sup>st</sup> (165.08; D Felony)

" 2<sup>nd</sup> (165.06; E Felony)

" 3<sup>rd</sup> (165.05; A Misd.)

Unlawful Surveillance 2<sup>nd</sup> (250.45; E Felony)

Incident	Agency:		A		New York State DOMESTIC INCIDENT REPORT			ORI:	Incident #
	Reported Date (MMDD/YYYY)	Time (24 hours)	Occurred Date (MMDD/YYYY)	Time (24 hours)	<input type="checkbox"/> Officer Initiated	<input type="checkbox"/> Radio Run	<input type="checkbox"/> Walk-in	Complaint #	
Address (Street No., Street Name, Bldg. No., Apt No.)							City, State, Zip		
Victim (P1)	Name (Last, First, M.I.) (Include Aliases)				DOB (MMDD/YYYY)	Age:	<input type="checkbox"/> Female <input type="checkbox"/> Male		
	Address (Street No., Street Name, Bldg. No., Apt No.)				Victim Phone Number:		Language:		
	City, State, Zip				<input type="checkbox"/> White <input type="checkbox"/> Black <input type="checkbox"/> Asian		<input type="checkbox"/> Hispanic <input type="checkbox"/> Non Hispanic <input type="checkbox"/> Unknown		
	How can we safely contact you? (i.e. Name, Phone, Email)				<input type="checkbox"/> American Indian <input type="checkbox"/> Other		<input type="checkbox"/> Other Identifier:		
Suspect (P2)	Name (Last, First, M.I.) (Include Aliases)				DOB (MMDD/YYYY)	Age:	<input type="checkbox"/> Female <input type="checkbox"/> Male		
	Address (Street No., Street Name, Bldg. No., Apt No.)				Suspect Phone Number:		Language:		
	City, State, Zip				<input type="checkbox"/> White <input type="checkbox"/> Black <input type="checkbox"/> Asian		<input type="checkbox"/> Hispanic <input type="checkbox"/> Non Hispanic <input type="checkbox"/> Unknown		
	<input type="checkbox"/> American Indian <input type="checkbox"/> Other				<input type="checkbox"/> Other Identifier:				
	Do suspect and victim live together? <input type="checkbox"/> Yes <input type="checkbox"/> No	Suspect/P2 present? <input type="checkbox"/> Yes <input type="checkbox"/> No	Was suspect injured? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes describe:		Possible drug or alcohol use? <input type="checkbox"/> Yes <input type="checkbox"/> No		Suspect supervised? <input type="checkbox"/> Probation <input type="checkbox"/> Parole <input type="checkbox"/> Not Supervised <input type="checkbox"/> Status Unknown		
Suspect (P2) Relationship to Victim (P1) <input type="checkbox"/> Married <input type="checkbox"/> Intimate Partner/Dating <input type="checkbox"/> Formerly Married <input type="checkbox"/> Former Intimate Partner <input type="checkbox"/> Parent of Victim (P1) <input type="checkbox"/> Child of Victim <input type="checkbox"/> Relative: <input type="checkbox"/> Other:							Do the suspect and victim have a child in common? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Victim Interview	Emotional condition of VICTIM? <input type="checkbox"/> Upset <input type="checkbox"/> Nervous <input type="checkbox"/> Crying <input type="checkbox"/> Angry <input type="checkbox"/> Other:								
	What were the first words that VICTIM said to the Responding Officers at the scene regarding the incident?								
	Did suspect make victim fearful? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:								
	Weapon Used? <input type="checkbox"/> Yes <input type="checkbox"/> No Gun: <input type="checkbox"/> Yes <input type="checkbox"/> No Other, describe:						Suspect Threats? <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes, Threats to:		
	Access to Guns? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:						<input type="checkbox"/> Victim <input type="checkbox"/> Child(ren) <input type="checkbox"/> Pet <input type="checkbox"/> Commit Suicide <input type="checkbox"/> Other Describe:		
	Injured? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:				Strangulation? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Loss of Consciousness <input type="checkbox"/> Urination/Defecation <input type="checkbox"/> Red eyes/Petechia <input type="checkbox"/> Sore Throat <input type="checkbox"/> Breathing Changed <input type="checkbox"/> Difficulty Swallowing				
In Pain? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:				Visible Marks? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:					
Suspect	What did the SUSPECT say (Before and After Arrest) :								
	710.30 completed? <input type="checkbox"/> Yes <input type="checkbox"/> No								
Witnesses	Child/Witness (1) Name (Last, First, M.I.)		DOB:	Child/Witness(1) Address (Street No., Name, Bldg./Apt)			City, State, Zip		Phone:
	Child/Witness (2) Name (Last, First, M.I.)		DOB:	Child/Witness(2) Address (Street No., Name, Bldg./Apt)			City, State, Zip		Phone:
Incident Narrative	Briefly describe the circumstances of this incident:								
DIR Repository checked? <input type="checkbox"/> Yes <input type="checkbox"/> No			Order of Protection Registry checked? <input type="checkbox"/> Yes <input type="checkbox"/> No			Order of Protection in effect? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Refrain <input type="checkbox"/> Stay Away			
Evid	Evidence Present? <input type="checkbox"/> Yes <input type="checkbox"/> No	Photos taken: <input type="checkbox"/> Victim Injury <input type="checkbox"/> Suspect Injury <input type="checkbox"/> Other:			Other Evidence: <input type="checkbox"/> Damaged Property <input type="checkbox"/> Videos <input type="checkbox"/> Electronic Evidence <input type="checkbox"/> Other:		Destruction of Property? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, Describe:		
	Offense Committed? <input type="checkbox"/> Yes <input type="checkbox"/> No	Was suspect arrested? <input type="checkbox"/> Yes <input type="checkbox"/> No If no, explain:		Offense 1		Law (e.g. PL)	Offense 2		Law (e.g. PL)
POLICE COPY (Please make a copy for DA's office if appropriate)				NYS DOMESTIC AND SEXUAL VIOLENCE HOTLINE 1-800-942-6906			3221-03/2016 DCJS Copyright © 2016 by NYS DCJS		

Incident	Agency: <b>A</b>		<b>New York State DOMESTIC INCIDENT REPORT</b>		ORI:	Incident #
	Reported Date (MM/DD/YYYY)	Time (24 hours)	Occurred Date (MM/DD/YYYY)	Time (24 hours)	<input type="checkbox"/> Officer Initiated <input type="checkbox"/> Radio Run <input type="checkbox"/> Walk-in	Complaint #
	Address (Street No., Street Name, Bldg. No., Apt No.)				City, State, Zip	
Victim (P1)	Name (Last, First, M.I.) (Include Aliases)				DOB (MM/DD/YYYY)	Age: <input type="checkbox"/> Female <input type="checkbox"/> Male
	Address (Street No., Street Name, Bldg. No., Apt No.)				Victim Phone Number:	Language:
	City, State, Zip				<input type="checkbox"/> White <input type="checkbox"/> Black <input type="checkbox"/> Asian <input type="checkbox"/> Hispanic <input type="checkbox"/> Non Hispanic <input type="checkbox"/> Unknown <input type="checkbox"/> American Indian <input type="checkbox"/> Other <input type="checkbox"/> Other Identifier:	
Suspect (P2)	Name (Last, First, M.I.) (Include Aliases)				DOB (MM/DD/YYYY)	Age: <input type="checkbox"/> Female <input type="checkbox"/> Male
	Address (Street No., Street Name, Bldg. No., Apt No.)				Suspect Phone Number:	Language:
	City, State, Zip				<input type="checkbox"/> White <input type="checkbox"/> Black <input type="checkbox"/> Asian <input type="checkbox"/> Hispanic <input type="checkbox"/> Non Hispanic <input type="checkbox"/> Unknown <input type="checkbox"/> American Indian <input type="checkbox"/> Other <input type="checkbox"/> Other Identifier:	
Do suspect and victim live together? <input type="checkbox"/> Yes <input type="checkbox"/> No		Suspect/P2 present? <input type="checkbox"/> Yes <input type="checkbox"/> No	Was suspect injured? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes describe:		Possible drug or alcohol use? <input type="checkbox"/> Yes <input type="checkbox"/> No	Suspect supervised? <input type="checkbox"/> Probation <input type="checkbox"/> Parole <input type="checkbox"/> Not Supervised <input type="checkbox"/> Status Unknown
Suspect (P2) Relationship to Victim (P1) <input type="checkbox"/> Married <input type="checkbox"/> Intimate Partner/Dating <input type="checkbox"/> Formerly Married <input type="checkbox"/> Former Intimate Partner <input type="checkbox"/> Parent of Victim (P1) <input type="checkbox"/> Child of Victim <input type="checkbox"/> Relative: <input type="checkbox"/> Other:					Do the suspect and victim have a child in common? <input type="checkbox"/> Yes <input type="checkbox"/> No	
Victim Interview	Emotional condition of VICTIM? <input type="checkbox"/> Upset <input type="checkbox"/> Nervous <input type="checkbox"/> Crying <input type="checkbox"/> Angry <input type="checkbox"/> Other:					
	What were the first words that VICTIM said to the Responding Officers at the scene regarding the incident?					
	Did suspect make victim fearful? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:					
	Weapon Used? <input type="checkbox"/> Yes <input type="checkbox"/> No Gun: <input type="checkbox"/> Yes <input type="checkbox"/> No Other, describe:				Suspect Threats? <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes, Threats to: <input type="checkbox"/> Victim <input type="checkbox"/> Child(ren) <input type="checkbox"/> Pet <input type="checkbox"/> Commit Suicide	
	Access to Guns? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:				Other Describe:	
Injured? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:			Strangulation? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Loss of Consciousness <input type="checkbox"/> Urination/Defecation			
In Pain? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:			<input type="checkbox"/> Red eyes/Petechia <input type="checkbox"/> Sore Throat <input type="checkbox"/> Breathing Changed <input type="checkbox"/> Difficulty Swallowing			
Suspect	What did the SUSPECT say (Before and After Arrest) :					
	710.30 completed? <input type="checkbox"/> Yes <input type="checkbox"/> No					
Witnesses	Child/Witness (1) Name (Last, First, M.I.)	DOB:	Child/Witness(1) Address (Street No., Name, Bldg./Apt)	City, State, Zip	Phone:	
	Child/Witness (2) Name (Last, First, M.I.)	DOB:	Child/Witness(2) Address (Street No., Name, Bldg./Apt)	City, State, Zip	Phone:	
Incident Narrative	Briefly describe the circumstances of this incident:					
Evid	DIR Repository checked? <input type="checkbox"/> Yes <input type="checkbox"/> No		Order of Protection Registry checked? <input type="checkbox"/> Yes <input type="checkbox"/> No		Order of Protection in effect? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Refrain <input type="checkbox"/> Stay Away	
	Evidence Present? <input type="checkbox"/> Yes <input type="checkbox"/> No	Photos taken: <input type="checkbox"/> Victim Injury <input type="checkbox"/> Suspect Injury <input type="checkbox"/> Other:	Other Evidence: <input type="checkbox"/> Damaged Property <input type="checkbox"/> Videos <input type="checkbox"/> Electronic Evidence <input type="checkbox"/> Other:		Destruction of Property? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, Describe:	
Offense	Offense Committed? <input type="checkbox"/> Yes <input type="checkbox"/> No	Was suspect arrested? <input type="checkbox"/> Yes <input type="checkbox"/> No If no, explain:	Offense 1	Law (e.g. PL)	Offense 2	Law (e.g. PL)
NYS DIVISION OF CRIMINAL JUSTICE SERVICES COPY			NYS DOMESTIC AND SEXUAL VIOLENCE HOTLINE 1-800-942-6906		3221-03/2016 DCJS Copyright © 2016 by NYS DCJS	

Incident	Agency: <b>A</b>		<b>New York State DOMESTIC INCIDENT REPORT</b>				Incident #	
	Reported Date (MMDD/YYYY)	Time (24 hours)	Occurred Date (MMDD/YYYY)	Time (24 hours)	<input type="checkbox"/> Officer Initiated	<input type="checkbox"/> Radio Run	<input type="checkbox"/> Walk-in	
	<input type="checkbox"/> ICAD (NYC)						Complaint #	
Address (Street No., Street Name, Bldg. No., Apt No.)						City, State, Zip		
Suspect (P2)	Name (Last, First, M.I.) (Include Aliases)				DOB (MMDD/YYYY)	Age:	<input type="checkbox"/> Female <input type="checkbox"/> Male	
	Address (Street No., Street Name, Bldg. No., Apt No.)				Suspect Phone Number:		Language:	
	City, State, Zip				<input type="checkbox"/> White <input type="checkbox"/> Black <input type="checkbox"/> Asian	<input type="checkbox"/> Hispanic <input type="checkbox"/> Non Hispanic <input type="checkbox"/> Unknown		
					<input type="checkbox"/> American Indian <input type="checkbox"/> Other		<input type="checkbox"/> Other Identifier:	
	Do suspect and victim live together? <input type="checkbox"/> Yes <input type="checkbox"/> No	Suspect/P2 present? <input type="checkbox"/> Yes <input type="checkbox"/> No	Was suspect injured? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes describe:		Possible drug or alcohol use? <input type="checkbox"/> Yes <input type="checkbox"/> No	Suspect supervised? <input type="checkbox"/> Probation <input type="checkbox"/> Parole <input type="checkbox"/> Not Supervised <input type="checkbox"/> Status Unknown		
<b>Suspect (P2) Relationship to Victim (P1)</b> <input type="checkbox"/> Married <input type="checkbox"/> Intimate Partner/Dating <input type="checkbox"/> Formerly Married <input type="checkbox"/> Former Intimate Partner <input type="checkbox"/> Parent of Victim (P1) <input type="checkbox"/> Child of Victim <input type="checkbox"/> Relative: <input type="checkbox"/> Other:						Do the suspect and victim have a child in common? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Victim Interview	Emotional condition of <b>VICTIM</b> ? <input type="checkbox"/> Upset <input type="checkbox"/> Nervous <input type="checkbox"/> Crying <input type="checkbox"/> Angry <input type="checkbox"/> Other:							
	What were the first words that <b>VICTIM</b> said to the Responding Officers at the scene regarding the incident?							
	Did suspect make victim fearful? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:							
	<b>Weapon Used?</b> <input type="checkbox"/> Yes <input type="checkbox"/> No Gun: <input type="checkbox"/> Yes <input type="checkbox"/> No Other, describe:				<b>Suspect Threats?</b> <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes, Threats to:			
	<b>Access to Guns?</b> <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:				<input type="checkbox"/> Victim <input type="checkbox"/> Child(ren) <input type="checkbox"/> Pet <input type="checkbox"/> Commit Suicide <input type="checkbox"/> Other Describe:			
	Injured? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:			<b>Strangulation?</b> <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Loss of Consciousness <input type="checkbox"/> Urination/Defecation				
In Pain? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:			<input type="checkbox"/> Red eyes/Petechia <input type="checkbox"/> Sore Throat <input type="checkbox"/> Breathing Changed <input type="checkbox"/> Difficulty Swallowing					
Suspect	What did the <b>SUSPECT</b> say (Before and After Arrest) :							
	710.30 completed? <input type="checkbox"/> Yes <input type="checkbox"/> No							
Incident Narrative	Briefly describe the circumstances of this incident:							
DIR Repository checked? <input type="checkbox"/> Yes <input type="checkbox"/> No		Order of Protection Registry checked? <input type="checkbox"/> Yes <input type="checkbox"/> No		Order of Protection in effect? <input type="checkbox"/> Yes <input type="checkbox"/> No			<input type="checkbox"/> Refrain <input type="checkbox"/> Stay Away	
Evid	Evidence Present? <input type="checkbox"/> Yes <input type="checkbox"/> No	<b>Photos taken:</b> <input type="checkbox"/> Victim Injury <input type="checkbox"/> Suspect Injury <input type="checkbox"/> Other:		<b>Other Evidence:</b> <input type="checkbox"/> Damaged Property <input type="checkbox"/> Videos <input type="checkbox"/> Electronic Evidence <input type="checkbox"/> Other:		<b>Destruction of Property?</b> <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, Describe:		
	Offense Committed? <input type="checkbox"/> Yes <input type="checkbox"/> No	Was suspect arrested? <input type="checkbox"/> Yes <input type="checkbox"/> No If no, explain:		Offense 1	Law (e.g. PL)	Offense 2	Law (e.g. PL)	
VICTIM / COMPLAINANT COPY			NYS DOMESTIC AND SEXUAL VIOLENCE HOTLINE 1-800-942-6906			3221-03/2016 DCJS Copyright © 2016 by NYS DCJS		

Agency:	<b>B</b>	ORI:	Incident #	Complaint #
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**Prior History**

Describe Victim's prior domestic incidents with this suspect (Last, Worst, First):

If the Victim answers "yes" to any questions in this box refer to the NYS Domestic and Sexual Violence Hotline at 1-800-942-6906 or Local Domestic Violence Service Provider: ( ) \_\_\_\_\_.

<b>Has Suspect ever:</b> Threatened to kill you or your children? <input type="checkbox"/> Yes <input type="checkbox"/> No Strangled or "choked" you? <input type="checkbox"/> Yes <input type="checkbox"/> No Beaten you while you were pregnant? <input type="checkbox"/> Yes <input type="checkbox"/> No	Is suspect capable of killing you or children? <input type="checkbox"/> Yes <input type="checkbox"/> No Is suspect violently and constantly jealous of you? <input type="checkbox"/> Yes <input type="checkbox"/> No Has the physical violence increased in frequency or severity over the past 6 months? <input type="checkbox"/> Yes <input type="checkbox"/> No
--	--

Is there reasonable cause to suspect a child may be the victim of abuse, neglect, maltreatment or endangerment?  Yes  No  
 If Yes, the Officer must contact the NYS Child Abuse Hotline Registry # 1-800-635-1522.

Was DIR given to the Victim at the scene? <input type="checkbox"/> Yes <input type="checkbox"/> No if NO, Why:	Was Victim Rights Notice given to the Victim? <input type="checkbox"/> Yes <input type="checkbox"/> No if NO, Why:
--	--

**Signatures:**

Reporting Officer (Print and Sign include Rank and ID#)	Supervisor (Print and Sign include Rank and ID#)
---	--

**STATEMENT OF ALLEGATIONS/SUPPORTING DEPOSITION**

\* Officers are encouraged to assist the Victim in completing this section of the form.

**Suspect Name** (Last, First, M.I)

I \_\_\_\_\_ (Victim/Deponent Name) state that on \_\_\_\_ / \_\_\_\_ / \_\_\_\_\_, (Date)  
 at \_\_\_\_\_ (Location of incident) in the County/City/Town/Village \_\_\_\_\_  
 of the State of New York, the following did occur:

(Use additional page as needed)

**False Statements made herein are punishable as a Class A Misdemeanor, pursuant to section 210.45 of the Penal Law.**

Victim/Deponent Signature	Date	<b>Note:</b> <i>Whether or not this form is signed, this DIR Form will be filed with Law Enforcement.</i>	Page
Witness or Officer Signature	Date		Of
Interpreter Signature and Interpreter Service Provider Name	Date		
Interpreter Requested <input type="checkbox"/> Yes <input type="checkbox"/> No Interpreter Used <input type="checkbox"/> Yes <input type="checkbox"/> No			

Agency:	<b>B</b>	ORI:	Incident #	Complaint #
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**Prior History**

Describe Victim's prior domestic incidents with this suspect (Last, Worst, First):

If the Victim answers "yes" to any questions in this box refer to the NYS Domestic and Sexual Violence Hotline at 1-800-942-6906 or Local Domestic Violence Service Provider: ( ) \_\_\_\_\_.

<b>Has Suspect ever:</b> Threatened to kill you or your children? <input type="checkbox"/> Yes <input type="checkbox"/> No Strangled or "choked" you? <input type="checkbox"/> Yes <input type="checkbox"/> No Beaten you while you were pregnant? <input type="checkbox"/> Yes <input type="checkbox"/> No	Is suspect capable of killing you or children? <input type="checkbox"/> Yes <input type="checkbox"/> No Is suspect violently and constantly jealous of you? <input type="checkbox"/> Yes <input type="checkbox"/> No Has the physical violence increased in frequency or severity over the past 6 months? <input type="checkbox"/> Yes <input type="checkbox"/> No
--	---

Is there reasonable cause to suspect a child may be the victim of abuse, neglect, maltreatment or endangerment?  Yes  No  
 If Yes, the Officer must contact the NYS Child Abuse Hotline Registry # 1-800-635-1522.

Was DIR given to the Victim at the scene? <input type="checkbox"/> Yes <input type="checkbox"/> No if NO, Why:	Was Victim Rights Notice given to the Victim? <input type="checkbox"/> Yes <input type="checkbox"/> No if NO, Why:
--	--

**Signatures:**

Reporting Officer (Print and Sign include Rank and ID#)	Supervisor (Print and Sign include Rank and ID#)
---	--

**STATEMENT OF ALLEGATIONS/SUPPORTING DEPOSITION**

\* Officers are encouraged to assist the Victim in completing this section of the form.

**Suspect Name** (Last, First, M.I)

I \_\_\_\_\_ (Victim/Deponent Name) state that on \_\_\_\_ / \_\_\_\_ / \_\_\_\_\_, (Date)  
 at \_\_\_\_\_ (Location of incident) in the County/City/Town/Village \_\_\_\_\_  
 of the State of New York, the following did occur:

(Use additional page as needed)

**False Statements made herein are punishable as a Class A Misdemeanor, pursuant to section 210.45 of the Penal Law.**

Victim/Deponent Signature	Date	<b>Note:</b> <i>Whether or not this form is signed, this DIR Form will be filed with Law Enforcement.</i>	Page
Witness or Officer Signature	Date		Of
Interpreter Signature and Interpreter Service Provider Name	Date		
Interpreter Requested <input type="checkbox"/> Yes <input type="checkbox"/> No Interpreter Used <input type="checkbox"/> Yes <input type="checkbox"/> No			

Agency:	<b>B</b>	Incident #	Complaint #
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**Prior History:** Describe Victim's prior domestic incidents with this suspect (Last, Worst, First):

If the Victim answers "yes" to any questions in this box refer to the NYS Domestic and Sexual Violence Hotline at 1-800-942-6906 or Local Domestic Violence Service Provider: ( ) \_\_\_\_\_

<b>Has Suspect ever:</b> Threatened to kill you or your children? <input type="checkbox"/> Yes <input type="checkbox"/> No Strangled or "choked" you? <input type="checkbox"/> Yes <input type="checkbox"/> No Beaten you while you were pregnant? <input type="checkbox"/> Yes <input type="checkbox"/> No	Is suspect capable of killing you or children? <input type="checkbox"/> Yes <input type="checkbox"/> No Is suspect violently and constantly jealous of you? <input type="checkbox"/> Yes <input type="checkbox"/> No Has the physical violence increased in frequency or severity over the past 6 months? <input type="checkbox"/> Yes <input type="checkbox"/> No
--	--

Is there reasonable cause to suspect a child may be the victim of abuse, neglect, maltreatment or endangerment?  Yes  No  
 If Yes, the Officer must contact the NYS Child Abuse Hotline Registry # 1-800-635-1522.

Was DIR given to the Victim at the scene? <input type="checkbox"/> Yes <input type="checkbox"/> No if NO, Why:	Was Victim Rights Notice given to the Victim? <input type="checkbox"/> Yes <input type="checkbox"/> No if NO, Why:
--	--

**Signatures:**

Reporting Officer (Print and Sign include Rank and ID#)	Supervisor (Print and Sign include Rank and ID#)
---	--

**STATEMENT OF ALLEGATIONS/SUPPORTING DEPOSITION**

\* Officers are encouraged to assist the Victim in completing this section of the form.

**Suspect Name** (Last, First, M.I)

I \_\_\_\_\_ (Victim/Deponent Name) state that on \_\_\_\_ / \_\_\_\_ / \_\_\_\_\_, (Date)  
 at \_\_\_\_\_ (Location of incident) in the County/City/Town/Village \_\_\_\_\_  
 of the State of New York, the following did occur:

(Use additional page as needed)

**False Statements made herein are punishable as a Class A Misdemeanor, pursuant to section 210.45 of the Penal Law.**

Victim/Deponent Signature	Date	<b>Note:</b> <i>Whether or not this form is signed, this DIR Form will be filed with Law Enforcement.</i>	Page
Witness or Officer Signature	Date		Of
Interpreter Signature and Interpreter Service Provider Name	Date		

Interpreter Requested  Yes  No Interpreter Used  Yes  No

**IF YOU ARE THE VICTIM OF DOMESTIC VIOLENCE, THE POLICE AND COURTS CAN HELP.**

**What the Police Can Do:**

- \*Assist you with finding a safe place, a place away from the violence.
- \*Inform you about how the court can help protect you from the violence.
- \*Help you and your children get medical care for any injuries you received.
- \*Assist you in getting necessary belongings from your home.
- \*Provide you with copies of police reports about the violence.
- \*File a complaint in criminal court, and tell you where your local criminal and family courts are located.

**What the Courts Can Do:**

- \*If the person who harmed you or threatened you is a relative by blood or marriage, or is someone you've had a child with, or is someone with whom you are or have had an intimate relationship, then you have the right to take your case to family court, criminal court or both.
- \*The forms you need are available from the family court and the criminal court.
- \*The courts can decide to provide a temporary order of protection for you, your children and any witnesses who may request one.
- \*The family court may appoint a lawyer to help you if the court finds that you cannot afford one.
- \*The family court may order temporary child support and temporary custody of your children.

**New York Law States:** If you are the victim of domestic violence, you may request that the officer assist in providing for your safety and that of your children, including providing information on how to obtain a temporary order of protection. You may also request that the officer assist you in obtaining your essential personal effects and locating and taking you, or assist in making arrangements to take you, and your children to a safe place within such officer's jurisdiction, including but not limited to a domestic violence program, a family member's or a friend's residence, or a similar place of safety. When the officer's jurisdiction is more than a single county, you may ask the officer to take you or make arrangements to take you and your children to a place of safety in the county where the incident occurred. If you or your children are in need of medical treatment, you have the right to request that the officer assist you in obtaining such medical treatment. You may request a copy of any incident reports at no cost from the law enforcement agency. You have the right to seek legal counsel of your own choosing and if you proceed in family court and if it is determined that you cannot afford an attorney, one must be appointed to represent you without cost to you. You may ask the district attorney or a law enforcement officer to file a criminal complaint. You also have the right to file a petition in the family court when a family offense has been committed against you. You have the right to *have your petition and* request for an order of protection filed on the same day you appear in court, and such request must be heard that same day or the next day court is in session. Either court may issue an order of protection from conduct constituting a family offense which could include, among other provisions, an order for the respondent or defendant to stay away from you and your children. The family court may also order the payment of temporary child support and award temporary custody of your children. If the family court is not in session, you may seek immediate assistance from the criminal court in obtaining an order of protection. The forms you need to obtain an order of protection are available from the family court and the local criminal court. The resources available in this community for information relating to domestic violence, treatment of injuries, and places of safety and shelters can be accessed by calling the following 800 numbers. Filing a criminal complaint or a family court petition containing allegations that are knowingly false is a crime. (NYS Criminal Procedure Law, Section 530.11 (6))

**NEW YORK STATE  
24 HOUR DOMESTIC AND SEXUAL  
VIOLENCE HOTLINE  
1-800-942-6906**

English and Español, Multi-language Accessibility  
National Relay Service for Deaf or Hard of Hearing:711

**NEW YORK CITY (all languages)  
1-800-621-Hope (4673) or 311**

**COURT INFORMATION**

New York City—Criminal Court Information  
**1-646-386-4500**

To obtain court information for other areas of NYS, ask the responding officer for court numbers, consult your phone directory, or call the Domestic and Sexual Violence Hotline (1-800-942-6906)

**VICTIM INFORMATION AND NOTIFICATION EVERYDAY (VINE)**

Victims may receive information relating to the status and release dates of persons incarcerated in state prison or local jails in New York State. For more information on this program and how you can register, call

**1-888-VINE-4NY (1-888-846-3469) or [www.vinelink.com](http://www.vinelink.com)**

**STATEWIDE AUTOMATED VICTIM INFORMATION AND NOTIFICATION (SAVIN-NY)**

Victim notification program which allows domestic violence victims to register to be notified when an Order of Protection has been served

**[www.nyalert.gov](http://www.nyalert.gov)**

## **Si USTED ES VÍCTIMA DE VIOLENCIA DOMÉSTICA, PUEDEN AYUDAR LA POLICÍA Y LOS TRIBUNALES.**

### **Lo que puede hacer la policía:**

- \* Ayudarle a encontrar un lugar seguro, un lugar lejos de la violencia.
- \* Informarle cómo la corte puede ayudar a protegerle de la violencia.
- \* Ayudarle a obtener atención médica para heridas o lesiones que usted y sus hijos pudieran haber sufrido.
- \* Ayudarle a sacar de su hogar las pertenencias necesarias.
- \* Proveerle copias de informes de la policía sobre la violencia.
- \* Presentar una querrela ante el tribunal en lo penal e informarle sobre la localización del tribunal en lo penal y del tribunal de familia en su comunidad.

### **Lo que pueden hacer los tribunales:**

- \* Si la persona que le hizo daño o que lo amenazó es su pariente o familiar político, o es alguien con quien usted tuvo un hijo, alguien con quien usted tiene o ha tenido una relación íntima, entonces usted tiene el derecho de llevar el caso al tribunal de familia, en lo penal, o ambos.
- \* Puede obtener los formularios que necesita en el tribunal de familia y en el tribunal en lo penal.
- \* Los tribunales podrían proveerle una orden de protección provisional para usted, sus hijos, y cualquier testigo que así lo pida.
- \* Si el tribunal determina que usted no puede pagar los servicios de un abogado, el tribunal puede asignarle uno.
- \* El tribunal de familia puede otorgarle manutención provisional para sus hijos, así como la custodia provisional de sus hijos.

La Ley de Nueva York establece que: Si usted es víctima de violencia doméstica, puede pedirle al oficial de la policía que resguarde su seguridad y la de sus hijos. Incluso, puede pedirle que le proporcione información sobre cómo obtener una orden temporal de protección. Asimismo, puede solicitar que dicho oficial de la policía le ayude a obtener sus efectos personales esenciales y a localizar un lugar seguro, al igual que transportarle a usted y a sus hijos a dicho lugar, o ayudarle a hacer arreglos para obtener dicha transportación dentro de la jurisdicción de dicho oficial de la policía, incluyendo pero sin limitarse a transportación a un programa que provea servicios contra la violencia doméstica, la residencia de un miembro de su familia o la residencia de un amigo, o un lugar que sea igualmente seguro. Cuando la jurisdicción de dicho oficial de la policía abarca más de un condado, usted puede pedirle al oficial que le transporte o que haga arreglos para transportarle a usted y a sus hijos a un lugar seguro en el condado donde ocurrió el incidente. Si usted o sus hijos necesitan tratamiento médico, usted tiene derecho a solicitar que dicho oficial de la policía le ayude a obtener dicho tratamiento médico. Usted puede solicitar que la agencia policial le provea una copia gratis de cualquier informe del incidente. Usted tiene derecho a buscar y escoger su propio consejero legal y si usted procede a utilizar el tribunal de familia y se determina que usted no puede pagar por los servicios de un abogado, uno deberá ser designado para que le represente sin costo para usted. Usted puede pedirle al fiscal de distrito o a un oficial de la policía que radique una querrela penal. Usted también tiene derecho a presentar una petición ante el tribunal de familia cuando una ofensa de familia ha sido cometida contra usted. Usted tiene derecho a presentar dicha petición y a solicitar una orden de protección el mismo día que usted comparece en tribunales, y dicha petición debe ser vista el tribunal ese mismo día, o el próximo día en que esté en sesión. Cualquiera de los tribunales puede expedir una orden de protección un causa de una conducta que constituya una ofensa de familia, la cual puede incluir entre otras disposiciones, una orden contra el demandado o acusado que le requiera permanecer lejos de usted y de sus niños. El tribunal de familia también puede ordenar el pago temporal de manutención para sus niños y otorgarle a usted la custodia temporal de sus niños. Si el tribunal de familia no está en sesión, usted puede solicitar ayuda inmediata del tribunal en lo penal para obtener una orden de protección. Los formularios que usted necesita para obtener una orden de protección están disponibles en el tribunal de familia y en el tribunal en lo penal. Para acceso a los recursos disponibles en esta comunidad que proveen información sobre violencia doméstica, tratamiento de lesiones, y lugares seguros y refugios, llame a los siguientes números gratuitos. Es un delito radicar una querrela penal o una petición ante el tribunal de familia, a sabiendas de que dicha querrela o petición contiene alegaciones falsas. (NYS Criminal Procedure Law, Section 530.11 (6))

### **ESTADO DE NUEVA YORK LÍNEAS DIRECTAS PARA VIOLENCIA DOMÉSTICA Y SEXUAL LAS 24 HORAS**

**1-800-942-6906**

**Inglés y Español, Multi-language Accessibility  
Servicio de retransmisión nacional para sordos o con  
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**CIUDAD DE NUEVA YORK (todo lenguajes)  
1-800-621-Hope (4673) o 311**

### **INFORMACIÓN DEL TRIBUNAL**

La ciudad de Nueva York  
Información de el tribunal de penal del condado  
**1-646-386-4500**

Para obtener la información del tribunal para otras áreas de NYS, pedirle al oficial de la policía que responde los números del tribunal, consulte su guía de telefonos, o llame el teléfono de Ayuda contra la violencia doméstica y sexual (número de teléfono proporcionado arriba).

### **Información y Notificación Diaria Para La Víctima (VINE)**

Las víctimas pueden recibir información relacionada con el estado y la fecha de excarcelación de personas encarceladas en prisiones estatales o en cárceles locales en el estado de Nueva York.

Para más información sobre este programa y como puede registrarse, llame al  
**1-888-VINE-4NY (1-888-846-3469) o [www.vinelink.com](http://www.vinelink.com)**

### **NOTIFICACIONES E INFORMACIÓN ESTATAL VÍCTIMA AUTOMATIZADO (SAVIN-NY)**

Programa de notificación de la víctima que les permite a las víctimas de violencia doméstica registrarse para ser Notificadas cuando una Orden judicial de protección de la familia ha sido entregada

**[www.nyalert.gov](http://www.nyalert.gov)**

McKinney's Consolidated Laws of New York Annotated  
Family Court Act (Refs & Annos)  
Article 1. Family Court Established (Refs & Annos)  
Part 5. General Powers

McKinney's Family Court Act § 154-e

§ 154-e. Orders of protection; filing and enforcement of out-of-state orders

Currentness

A valid order of protection or temporary order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction shall be accorded full faith and credit and enforced under article eight of this act as if it were issued by a court within the state for as long as the order remains in effect in the issuing jurisdiction in accordance with sections two thousand two hundred sixty-five and two thousand two hundred sixty-six of title eighteen of the United States Code.

1. An order issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction shall be deemed valid if:

a. the issuing court had personal jurisdiction over the parties and over the subject matter under the law of the issuing jurisdiction;

b. the person against whom the order was issued had reasonable notice and an opportunity to be heard prior to issuance of the order; provided, however, that if the order was a temporary order of protection issued in the absence of such person, that notice had been given and that an opportunity to be heard had been provided within a reasonable period of time after the issuance of the order; and

c. in the case of orders of protection or temporary orders of protection issued against both a petitioner and respondent, the order or portion thereof sought to be enforced was supported by: (i) a pleading requesting such order, including, but not limited to, a petition, cross-petition or counterclaim; and (ii) a judicial finding that the requesting party is entitled to the issuance of the order which may result from a judicial finding of fact, judicial acceptance of an admission by the party against whom the order was issued or judicial finding that the party against whom the order was issued had given knowing, intelligent and voluntary consent to its issuance.

2. Notwithstanding the provisions of article fifty-four of the civil practice law and rules, an order of protection or temporary order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction, accompanied by a sworn affidavit that upon information and belief such order is in effect as written and has not been vacated or modified, may be filed without fee with the clerk of the family court, who shall transmit information regarding such order to the statewide registry of orders of protection and warrants established pursuant to section two hundred twenty-one-a of the executive law; provided, however, that such filing and registry entry shall not be required for enforcement of the order.

**Credits**

(Added L.1998, c. 597, § 6. eff. Dec. 22, 1998.)

**Editors' Notes**

**SUPPLEMENTARY PRACTICE COMMENTARIES**

by Prof. Merril Sobie

**2016**

Out-of-state orders of protection may be filed and enforced in New York in accord with Section 154-e. However, once filed, the section does not provide a mechanism to vacate or terminate the out-of-state order. In *Matter of Kristina P. v. Wilfredo M.*, 51 Misc.3d 926, 28 N.Y.S.3d 276 (Fam. Ct. Queens Co. 2016), the petitioner filed a protective order issued in Florida. The Clerk of the Court thereupon prepared a comparable New York order and forwarded the order to the State Police for inclusion in the state registry pursuant to Executive Law Section 221-a. Since the Florida decree did not include an expiration date, the Clerk absurdly decided that the order should be in effect for 100 years.

Less than one century later, in fact within about one year, the parties agreed to vacate the order. Step one was to successfully petition the Florida court. Step two, vacating the New York order, proved more difficult, despite the fact that the underlying Florida order had ceased to exist. In the end, the court agreed to vacate despite the absence of explicit statutory authority or a prescribed procedure. It would be preferable to amend Section 154-e to cover that common contingency.

**PRACTICE COMMENTARIES**

by Prof. Merril Sobie

Section 154-e was added in 1998 to strengthen “provisions of existing law relating to out-of-state orders of protection”.

As explained in the Executive Memorandum for the chapter law:

The bill recognizes that orders of protection, regardless of where they are issued, are far too frequently violated, often with serious consequences for those the orders are supposed to protect. Although federal law requires the enforcement of out-of-state orders of protection in New York State, local officials, unfamiliar with the federal law, sometimes fail to enforce out-of-state orders, leaving domestic violence victims vulnerable to further abuse. The bill remedies this weakness by explicitly requiring the enforcement of out-of-state orders of protection in New York State. [Executive Memorandum, L.1998, c. 597.]

Notes of Decisions (1)

McKinney's Family Court Act § 154-e, NY FAM CT § 154-e  
Current through L.2016, chapters 1 to 422.

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KeyCite Yellow Flag - Negative Treatment  
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated  
Family Court Act (Refs & Annos)  
Article 8. Family Offenses Proceedings (Refs & Annos)  
Part 2. Preliminary Procedure

McKinney's Family Court Act § 828

§ 828. Temporary order of protection; temporary order for child support

Currentness

1. (a) Upon the filing of a petition or counter-claim under this article, the court for good cause shown may issue a temporary order of protection, which may contain any of the provisions authorized on the making of an order of protection under section eight hundred forty-two, provided that the court shall make a determination, and the court shall state such determination in a written decision or on the record, whether to impose a condition pursuant to this subdivision, provided further, however, that failure to make such a determination shall not affect the validity of such order of protection. In making such determination, the court shall consider, but shall not be limited to consideration of, whether the temporary order of protection is likely to achieve its purpose in the absence of such a condition, conduct subject to prior orders of protection, prior incidents of abuse, extent of past or present injury, threats, drug or alcohol abuse, and access to weapons.

(b) Upon the filing of a petition under this article, or as soon thereafter as the petitioner appears before the court, the court shall advise the petitioner of the right to proceed in both the family and criminal courts, pursuant to the provisions of section one hundred fifteen of this act.

2. A temporary order of protection is not a finding of wrongdoing.

3. The court may issue or extend a temporary order of protection ex parte or on notice simultaneously with the issuance of a warrant, directing that the respondent be arrested and brought before the court, pursuant to section eight hundred twenty-seven of this article.

4. Notwithstanding the provisions of section eight hundred seventeen of this article the court may, together with a temporary order of protection issued pursuant to this section, issue an order for temporary child support, in an amount sufficient to meet the needs of the child, without a showing of immediate or emergency need. The court shall make an order for temporary child support notwithstanding that information with respect to income and assets of the respondent may be unavailable. Where such information is available, the court may make an award for temporary child support pursuant to the formula set forth in subdivision one of section four hundred thirteen of this act. An order making such award shall be deemed to have been issued pursuant to article four of this act. Upon making an order for temporary child support pursuant to this subdivision, the court shall advise the petitioner of the availability of child support enforcement services by the support collection unit of the local department of social services, to enforce the temporary order and to assist in securing continued child support, and shall set the support matter down for further proceedings in accordance with article four of this act.

**§ 828. Temporary order of protection; temporary order for child support, NY FAM CT § 828**

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Where the court determines that the respondent has employer-provided medical insurance, the court may further direct, as part of an order of temporary support under this subdivision, that a medical support execution be issued and served upon the respondent's employer as provided for in section fifty-two hundred forty-one of the civil practice law and rules.

**Credits**

(Added L.1964, c. 156, § 7. Amended L.1977, c. 449, § 5; L.1980, c. 530, § 8; L.1988, c. 702, § 2; L.1988, c. 706, § 7; L.1994, c. 222, §§ 17-a to 19.)

**Editors' Notes**

**SUPPLEMENTARY PRACTICE COMMENTARIES**

by Prof. Merrill Sobie

**2012**

Temporary orders of protection are frequently issued on an ex parte basis, i.e. before the respondent has had an opportunity to appear or otherwise contest the allegations. Unfortunately, the ability to readily obtain an ex parte temporary order may be abused. That was the situation in *Matter of Taub v. Taub*, 94 A.D.3d 901, 942 N.Y.S.2d 145 (2d Dept. 2012). The petitioning wife had on several occasions obtained an ex parte order based on false allegations. The remedy, designed to short-circuit the destructive pattern, was to prohibit any further Article 8 petition except by motion or application for judicial action made on notice to the respondent.

**PRACTICE COMMENTARIES**

by Prof. Merrill Sobie

Temporary orders of protection are needed, and are granted, in many Article 8 cases. Indeed, securing the order is frequently the petitioner's paramount motivation. Accordingly, a temporary protective order may be issued "[u]pon the filing of a petition or counter-claim ..." [§ 828(1)(a)], a clause which encompasses ex parte orders issued on the date of the petitioner's initial appearance, and ordinarily predicated upon the petitioner's written allegations, a brief sworn statement on the record, and the argument of counsel (assuming the petitioner is represented at that juncture). However, the clause "upon the filing of a petition" should not be read literally; a temporary order may be issued at any time pending the case's final disposition.

The temporary order may include any provision or condition which could be included in a permanent Section 842 order. The protective order may thus include one or more of a vast array of possibilities ranging from desisting from committing a family offense, to an injunction "to stay away from the home" of the adversarial party, the other parent or a child [§ 842(a)], in effect an eviction of the respondent from his home. (See the Commentary following Section 842 for a discussion of the terms and conditions of a protective order.)

Given the possibly extreme repercussions to the respondent, the lack of statutory due process following the issuance of an ex parte temporary order is both surprising and troubling. There is no provision for the respondent to subsequently contest the order (Section 844, which provides for the "reconsideration and modification" of a final disposition, does not encompass temporary orders). Courts nevertheless often reconsider and modify temporary orders, including the ex parte variety, a measure which is arguably

§ 828. Temporary order of protection; temporary order for child support, NY FAM CT § 828

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constitutionally required. It would be preferable to amend Article 8 to mandate the reconsideration of at least ex parte orders upon motion of the respondent, with the right to an evidentiary hearing in appropriate contested cases.

Compounding the procedural problem is the fact that a temporary order, unlike a permanent order, is not appealable “as of right”. Instead, leave to appeal must be obtained from the Appellate Division pursuant to Section 1112; see *Best v. Belgrave*, 13 A.D.3d 366, 785 N.Y.S.2d 744 (2d Dept. 2005), appeal dismissed 4 N.Y.3d 850, 797 N.Y.S.2d 424, 830 N.E.2d 323 (2005). In fact, a temporary order, which expires upon the issuance of a permanent order or the dismissal of the petition, may be deemed to be moot at that point and hence may never be appealable; see *In re Jazmone S.*, 18 A.D.3d 761, 795 N.Y.S.2d 688 (2d Dept. 2005).

The final subdivision, added in 1994 [L.1994, c.222], authorizes the Court to issue a temporary child support order. When issued, the order “... shall be deemed to have been issued pursuant to article four of this act”, and the Court “... shall set the support matter down for further proceedings in accordance with article four of this act”. In other words, the Court may jump-start an Article 4 proceeding.

Article 8 cases frequently involve children. The respondent may or not be supporting his offspring, and an order of protection in itself may precipitate support issues. Hence the logical link between Article 8 and Article 4. However, the manner in which Section 828 implements the link is questionable. First, subdivision 4 assumes jurisdiction for child support purposes, without reference to the salient jurisdictional statute, Section 580-201 (which incorporates the Uniform Interstate Family Support Act). The assumption is valid in most cases, but not in all cases. For example, the respondent or the child may reside in a different state, or another jurisdiction may have issued a temporary or a permanent support decree. In such event, even long-armed Section 580-201 may not be satisfied, and the Court cannot obtain jurisdiction, despite Section 828 (see the Commentary following Section 580-201). Jurisdiction should never be taken for granted, and counsel should ensure that the Section 580-201 criteria are met (although, again, the criteria will be satisfied in the large majority of Article 8 cases).

Second, the lack of an Article 4 petition poses problems. The desirability of appropriate sworn allegations, the need for notice, and the Article 4 requirement to provide at least preliminary financial data, are all absent (see Section 426). With respect to temporary orders, Section 434 parallels Section 828(4), requiring the Court to issue an expedited temporary order of support. Subdivision 4 would better serve child support needs by authorizing the Court to direct the forthwith filing of an Article 4 petition, a procedure which, in any event, is not precluded (Section 828 notwithstanding), and one which is commonly employed by the Court or by counsel (surely the petitioner's attorney may advise and assist the petitioner in seeking a child support order).

Notes of Decisions (17)

McKinney's Family Court Act § 828, NY FAM CT § 828  
Current through L.2016, chapters 1 to 422.

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F.C.A. §842-a

Form 8-6  
(Family Offense - Order  
and Notice to Law Enforcement  
Agency - Firearms Licenses  
and Surrenders)  
(8/2010)

At a term of Family Court of the  
State of New York, held in and for the  
County of \_\_\_\_\_  
at \_\_\_\_\_ New York  
on \_\_\_\_\_

**PRESENT:**  
Hon.  
Judge

\_\_\_\_\_  
In the Matter of

Petitioner,

-against-

Respondent.  
Date of Birth: \_\_\_\_\_

Docket No.

**ORDER - FIREARMS LICENSES  
AND SURRENDERS-  
NOTICE TO LAW  
ENFORCEMENT AGENCY**

**TO: NEW YORK STATE POLICE<sup>1</sup>  
LOCAL POLICE AUTHORITY [Specify]:**

An (order of protection)(temporary order of protection) under Article 8 of the Family Court Act  
having been issued by this Court on \_\_\_\_\_, and this Court having made findings in accordance with  
Section 842-a of said Act,

**PLEASE TAKE NOTICE THAT [Check applicable box(es)]:**

The Respondent has been ordered to surrender any and all firearms owned or possessed,  
including, but not limited to, the following [specify]: \_\_\_\_\_

<sup>1</sup>This form must be sent to local law enforcement agencies in all cases involving firearms  
surrender or fire arms license suspension, revocation or ineligibility orders. Additionally, where a  
firearms license revocation, suspension, ineligibility or surrender order is vacated or modified, this form  
must also be sent to the New York State Police, Pistol Permit Section, Public Security Building, State  
Campus Building #22, 1220 Washington Avenue, Albany, NY 12226-2252. Notification to the statewide  
registry of orders of protection regarding the issuance of orders of protection containing firearms  
conditions will suffice as notice to the New York State Police at the stage of issuance of the order of  
protection.

\_\_\_\_\_. Such surrender shall take place on or before  
[specify date/time]: \_\_\_\_\_ at:[specify location]:<sup>2</sup> \_\_\_\_\_  
\_\_\_\_\_ ; (and).

The Respondent's license to carry, possess, repair, sell or otherwise dispose of a firearm or firearms, if any, pursuant to Penal Law §400.00, has been  permanently revoked<sup>3</sup>  suspended until [specify date of expiration of order of protection or temporary order of protection]:

The Respondent shall remain ineligible to receive a firearm license until [specify date of expiration of order of protection or temporary order of protection]:  
, unless extended by this Court; (and)(or)

The order of this Court, dated \_\_\_\_\_,  directing the surrender of firearm  
 suspending Respondent's firearms license, if any  revoking Respondent's firearms license, if any  
 directing that Respondent shall be ineligible to receive a firearms license) has been:  
 VACATED  MODIFIED as follows [specify]:

AND IT IS HEREBY ORDERED THAT the law enforcement agency to whom such  
surrender is to be made shall report back to this Court regarding Respondent's compliance with the  
order of surrender by [specify date]:

AND IT IS FURTHER ORDERED THAT:

ENTER

\_\_\_\_\_  
JUDGE OF THE FAMILY COURT

PURSUANT TO SECTION 1113 OF THE FAMILY COURT ACT,  
AN APPEAL FROM THIS ORDER MUST BE TAKEN WITHIN 30  
DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT,  
35 DAYS FROM THE DATE OF MAILING OF THE ORDER TO  
APPELLANT BY THE CLERK OF COURT, OR 30 DAYS AFTER  
SERVICE BY A PARTY OR THE ATTORNEY FOR THE CHILD  
UPON THE APPELLANT, WHICHEVER IS EARLIEST.

Date: \_\_\_\_\_

Check applicable box:

Order mailed on [specify date(s) and to whom mailed]: \_\_\_\_\_  
 Order received in court on [specify date(s) and to whom given]: \_\_\_\_\_

<sup>2</sup>In New York City, Respondent may be directed to surrender firearms at any New York City Police Department precinct.

<sup>3</sup>Permanent revocation is authorized for final orders of protection and dispositions upon violations of orders of protection only. See F.C.A. §842-a.

ORI No: \_\_\_\_\_  
Order No: \_\_\_\_\_  
NYSID No: \_\_\_\_\_

At a Term of the \_\_\_\_\_ Court  
County of \_\_\_\_\_, State of New York  
(address) \_\_\_\_\_

PRESENT: Hon. \_\_\_\_\_

**TEMPORARY  
ORDER OF PROTECTION  
[Articles 4, 5, 6, 8 and 10]**

**In the Matter of a Proceeding under  
Article \_\_\_\_ of the Family Court Act**

Petitioner

Date of Birth: \_\_\_\_\_

Respondent

Date of Birth: \_\_\_\_\_

Docket No. \_\_\_\_\_  
Family Unit No. \_\_\_\_\_  
(check one)  
 Ex Parte  
 Both Parties Present in Court

**NOTICE: YOUR FAILURE TO OBEY THIS ORDER MAY SUBJECT YOU TO MANDATORY ARREST AND CRIMINAL PROSECUTION, WHICH MAY RESULT IN YOUR INCARCERATION FOR UP TO SEVEN YEARS FOR CRIMINAL CONTEMPT, AND/OR MAY SUBJECT YOU TO FAMILY COURT PROSECUTION AND INCARCERATION FOR UP TO SIX MONTHS FOR CONTEMPT OF COURT. IF YOU FAIL TO APPEAR IN COURT WHEN YOU ARE REQUIRED TO DO SO, THIS ORDER MAY BE EXTENDED IN YOUR ABSENCE AND THEN CONTINUES IN EFFECT UNTIL A NEW DATE SET BY THE COURT.**

**THIS ORDER OF PROTECTION WILL REMAIN IN EFFECT EVEN IF THE PROTECTED PARTY HAS, OR CONSENTS TO HAVE, CONTACT OR COMMUNICATION WITH THE PARTY AGAINST WHOM THE ORDER IS ISSUED. THIS ORDER OF PROTECTION CAN ONLY BE MODIFIED OR TERMINATED BY THE COURT. THE PROTECTED PARTY CANNOT BE HELD TO VIOLATE THIS ORDER NOR BE ARRESTED FOR VIOLATING THIS ORDER.**

A petition under Article \_\_\_\_ of the Family Court Act, sworn to on \_\_\_\_\_, having been filed in this Court in the above entitled proceeding, and good cause having been shown and the Respondent having been [check applicable box]: present in Court and advised of the issuance and contents of this Order not present in Court,

**NOW, THEREFORE, IT IS HEREBY ORDERED** that [specify first name, middle initial and last name]: \_\_\_\_\_ must observe the following conditions of behavior:

**(Check Applicable Paragraphs and Subparagraphs):**

- [01]  Stay away from [A]  [name(s) of protected person(s)]: \_\_\_\_\_ and/or from the [B]  home of \_\_\_\_\_, [C]  school of \_\_\_\_\_, [D]  business of \_\_\_\_\_, [E]  place of employment of \_\_\_\_\_, [F]  other [specify location] \_\_\_\_\_;

[14]  Refrain from communication or any other contact or by mail, telephone, e-mail, voice-mail or other electronic or any other means with [specify protected person(s)]: \_\_\_\_\_;

[02]  Refrain from assault, stalking, harassment, aggravated harassment, menacing, reckless endangerment, strangulation, criminal obstruction of breathing or circulation, disorderly conduct, criminal mischief, sexual abuse, sexual misconduct, forcible touching, intimidation, threats, identity theft, grand larceny, coercion or any criminal offense against [specify protected person(s) and/or members of protected person's family or household, and/or person(s) with custody of child(ren)]: \_\_\_\_\_;

[15]  Refrain from intentionally injuring or killing without justification the following companion animal(s) (pet(s)) [specify type(s) and, if available, name(s)]: \_\_\_\_\_;

[11]  Permit [specify individual]: \_\_\_\_\_ to enter the residence at [specify]: \_\_\_\_\_ during [specify date/time]: \_\_\_\_\_ with [specify law enforcement agency, if any]: \_\_\_\_\_ to remove personal belongings not in issue in litigation [specify items]: \_\_\_\_\_;

[04]  Refrain from [indicate acts]: \_\_\_\_\_ that create an unreasonable risk to the health, safety or welfare of [specify child(ren), family or household member(s)]: \_\_\_\_\_;

[05]  Permit [specify individual]: \_\_\_\_\_, entitled by a court order or separation or other written agreement to visit with [specify child(ren)]: \_\_\_\_\_ during the following periods of time [specify]: \_\_\_\_\_ under the following terms and conditions [specify]: \_\_\_\_\_;

[07]  Custody of [specify child(ren)]: \_\_\_\_\_ shall be awarded to [specify individual]: \_\_\_\_\_ under the following terms and conditions [specify]: \_\_\_\_\_;

[12] Surrender any and all handguns, pistols, revolvers, rifles, shotguns and other firearms owned or possessed, including, but not limited to, the following: \_\_\_\_\_ and do not obtain any further guns or other firearms. Such surrender shall take place immediately, but in no event later than [specify date/time]: \_\_\_\_\_ at [specify location]: \_\_\_\_\_;

[ ] Promptly return or transfer the following identification documents specify]: \_\_\_\_\_ to the party protected by this Order NOT LATER THAN [specify date]: \_\_\_\_\_ in the following manner [specify manner or mode of return or transfer]: \_\_\_\_\_;

[Check box(es) if applicable]: Such documents shall be made available for use as evidence in this judicial proceeding.

[Jointly owned documents or documents in both parties' names only]: The following document(s) may be used as necessary for legitimate use by the Respondent [specify]: \_\_\_\_\_.

Pay or provide access to health or medical insurance for necessary medical care and treatment arising from the incident or incidents forming the basis of the order [specify beneficiary of treatment and coverage] \_\_\_\_\_;

**Arts. 5,6&8 only** Pay counsel fees (and/or) any costs associated with the order to [specify person and terms] \_\_\_\_\_;

**Arts. 4,5&6 only** Participate in an educational program, (and pay the costs thereof)[(specify program) \_\_\_\_\_];

**Art. 8 only** Participate in a batterer's education program designed to help end violent behavior (and pay the costs thereof)[specify program] \_\_\_\_\_;

**Art. 8 only** Pay to the petitioner/victim(s) restitution, as follows [specify terms and amount up to \$1 0,000]: \_\_\_\_\_; and

[99] Observe such other condition(s) as are necessary to further the purposes of protection [specify conditions]: \_\_\_\_\_  
\_\_\_\_\_;

**Art. 8 only [check if applicable]:** Respondent is on probation [FCA§842 requires order to state if Respondent is on probation].

**AGGRAVATING CIRCUMSTANCES FINDING [check box and fill in if applicable]:**

The court has made a finding on the record of the existence of the following **AGGRAVATING CIRCUMSTANCES:** \_\_\_\_\_  
\_\_\_\_\_.

**It is further ordered** that the above-named Respondent's license to carry, possess, repair, sell or otherwise dispose of a firearm or firearms, if any, pursuant to Penal Law §400.00, is [check applicable box(es)]: [13A]  suspended, or [13B]  revoked, (note: final order only) and/or [13C]  the Respondent shall remain ineligible to receive a firearm license while this Order is in effect.

**It is further ordered** that this order of protection shall remain in force until and including [specify date]: \_\_\_\_\_, \_\_\_\_\_ but if you fail to appear in court when you are required to do so, the order may be extended and continue in effect until a new date set by the Court.

**The Family Court Act** provides that presentation of a copy of this order of protection to any police officer or peace officer acting pursuant to his or her special duties authorizes, and sometimes requires, the officer to arrest a person who is alleged to have violated its terms and to bring him or her before the Court to face penalties authorized by law.

**Federal law requires that this order is effective outside, as well as inside, New York State.** It must be honored and enforced by state and tribal courts, including courts of a state, the District of Columbia, a commonwealth, territory or possession of the United States, if the person restrained by the order is an intimate partner of the protected party and has or will be afforded reasonable notice and opportunity to be heard in accordance with state law sufficient to protect due process rights (18 U.S.C. §§ 2265, 2266).

**It is a federal crime to:**

- cross state lines to violate this order or to stalk, harass or commit domestic violence against an intimate partner or family member;
- buy, possess or transfer a handgun, rifle, shotgun or other firearm or ammunition while this Order remains in effect (Note: there is a limited exception for military or law enforcement officers but only while they are on duty) ; and
- buy, possess or transfer a handgun, rifle, shotgun or other firearm or ammunition after a conviction of a domestic violence-related crime involving the use or attempted use of physical force or a deadly weapon against an intimate partner or family member, even after this Order has expired.. (18 U.S.C. §§922(g)(8), 922(g)(9), 2261, 2261A, 2262).

**Dated:**

\_\_\_\_\_  
JUDGE OF THE FAMILY COURT

COURT (COURT SEAL)

PURSUANT TO SECTION 1113 OF THE FAMILY COURT ACT, AN APPEAL FROM THIS ORDER MUST BE TAKEN WITHIN 30 DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT, 35 DAYS FROM THE DATE OF MAILING OF THE ORDER TO APPELLANT BY THE CLERK OF COURT, OR 30 DAYS AFTER SERVICE BY A PARTY OR THE ATTORNEY FOR THE CHILD UPON THE APPELLANT, WHICHEVER IS EARLIEST.

**Check Applicable Box(es):**

Party against whom order was issued was present in Court and advised in Court of issuance and contents of Order  
Order personally served in Court upon party against whom order was issued

Service directed by other means [specify]: \_\_\_\_\_  
[Modifications or extensions only]: Order mailed on [specify date and to whom mailed]: \_\_\_\_\_  
Warrant issued for party against whom order was issued [specify date]: \_\_\_\_\_  
Additional service information [specify]: \_\_\_\_\_



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**Representation in Family Court Proceedings**

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**Topic Four**

**Crossing Borders**



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## **Representation in Family Court Proceedings**

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### **Indian Child Welfare Act**



## **Indian Child Welfare Act**

### **Applications in New York / Impact on “New York Native Children”**

#### **What is ICWA and Who is an Indian: Recognizing Borders**

Statute (1978):

25 USC §1901-1963 Indian Child Welfare Act

[www.gpo.gov](http://www.gpo.gov)

Note esp 1901-1902,1903 Definitions

1911Congressional Findings, declaration of policy, Indian Tribe Jurisdiction....

Federal Regulation: June 8, 2016 FINAL RULE

25 CFR 23 et seq

Multi-Ethnic Placement Act (1994) 42 USC 5115a.

New York State Social Service Law:

SOS 2. 35, 36

New York Office of Family & Children’s Services Publications

4757, 5046, 5135, [ocfs.ny.gov/main/publications/pub4757](http://ocfs.ny.gov/main/publications/pub4757)

[ocfs.ny.gov/main/publications/pub5046](http://ocfs.ny.gov/main/publications/pub5046)

REVISED 11/16 Letters to Parent, Tribal Nation Government, Department of Interior

See NY State Family Court Forms

[www.nycourts.gov/forms/familycourt/](http://www.nycourts.gov/forms/familycourt/)

General: GF 17, 19, 20, 21,

31, 32 GF-32 Addendum to Findings in Indian Child Welfare

&

Child Protection 10-6,10-7, 10-7(e), 10-10 (ORDER)

&

UCCJEA - 19

Key Cases:

Morton v. Mancari 417 U.S. 535 (1974)

Santa Clara Pueblo v. Martinez 436 U.S. 49 (1978)

Mississippi Band of Choctaw Indians v. Holyfield 490 U.S. 30 (1989)

Adoptive Couple v. Baby Girl 570 U.S. \_\_\_\_\_ (2013), 133 S.Ct2552, 186 L.Ed 2<sup>nd</sup> 729  
 (“aka Baby Veronica”)



UNITED STATES CODE TITLE 25

- INDIANS CHAPTER 21 -

INDIAN CHILD WELFARE

Contents

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§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds -

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power \* \* \* To regulate Commerce \* \* \* with Indian tribes (FOOTNOTE 1) " and, through this and other constitutional authority, Congress has plenary power over Indian affairs; (FOOTNOTE 1) So in original. Probably should be capitalized.

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources; (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that

the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe; (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

#### § 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

#### § 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term -

(1) "child custody proceeding" shall mean and include - (i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated; (ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship; (iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and (iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents. (2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent; (3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 1606 of title 43; (4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe; (5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts; (6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child; (7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians; (8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43; (9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established; (10) "reservation" means Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation; (11) "Secretary" means the Secretary of the Interior; and (12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of

Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under

**New York State Social Services Law Sec. 2**

35. Indian tribe shall mean those tribes designated as Indian tribes by the bureau of Indian affairs of the federal department of the interior or by the state of New York.

36. Indian child shall mean any unmarried person who:

- (a) is under the age of eighteen; or
- (b) is under the age of twenty-one, entered foster care prior to his/her eighteenth birthday and remains in care, and who:
  - (i) is a member of an Indian tribe, or
  - (ii) is eligible for membership in an Indian tribe, or
  - (iii) is the biological child of a member of an Indian tribe and is residing on or is domiciled within an Indian reservation.

# New York State Indian Nations/Tribes

## Iroquois Nations:

(State and Federally Recognized)

### Cayuga Nation

P.O. Box 803  
Seneca Falls, N.Y. 13148  
(315) 568-0750

### Oneida Indian Nation

Oneida Indian Nation Member Benefits  
577 Main Street  
Oneida, N.Y. 13421  
(315) 829-8337

### Onondaga Nation

Onondaga Nation Council of Chiefs  
P.O. Box 85  
Nedrow, N.Y. 13120  
(315) 469-9196

### Seneca Nation

Allegany Reservation  
P.O. Box 231  
Salamanca, N.Y. 14779  
(716) 945-1790 Ext. 3233  
Cattaraugus Reservation  
12387 Route 438  
Irving, N.Y. 14081  
(716) 532-4035

### St. Regis Mohawk Tribe

412 State Route 37  
Akwesasne, N.Y. 13655  
(518) 358-4516

### Tonawanda Band of Senecas

7027 Meadville Road  
Basom, N.Y. 14013  
(716) 542-4244

### Tuscarora Nation

2006 Mount Hope Road  
Lewiston, N.Y. 14092  
(716) 297-1148

## Algonquin Nations:

(State and Federally Recognized)

### Shinnecock Indian Nation

PO Box 5006  
Southampton, NY 11969  
(631) 283-6143

(State Recognized Only)

### Unkechaug Indian Nation

Poospatuck Reservation  
P.O. Box 86  
Mastic, N.Y. 11950  
(631) 281-6464



## For further information on Native American

Programs, see *A Proud Heritage:*

*Native American Services in New York State*

(OCFS Publication #4629) and *A Guide to*

*Compliance of the Federal Indian Child Welfare Act*

*in New York State* (OCFS Publication #4757).

If you are unclear about your responsibility,  
please immediately contact:

New York State

Office of Children and Family Services

Native American Services

295 Main Street, Suite 545

Buffalo, N.Y. 14203

(716) 847-3123

Pub. 5046 (Rev. 11/11)



# Indian Child Welfare Act Compliance Desk Aid

## for New York State Child Welfare Workers

The federal Indian Child Welfare Act (ICWA) became law in 1978, and in 1987 New York State amended the Social Services Law and State Regulations to reflect federal standards. Compliance is mandatory.\*

## Steps to Improve Compliance:

1. Identify Native American nation/tribe.
2. Provide tribal notification.
3. Engage tribe in service plan development.
4. Follow placement preferences.
5. Make active efforts to provide remedial services and rehabilitative programs.

## Who Is an Indian Child?

*Definition of Indian Child:*  
Section 2 (36) of the Social Services Law

Indian child shall mean any unmarried person who:

- (a) is under the age of 18, or
- (b) is under the age of 21, entered foster care prior to his/her 18th birthday, who remains in foster care, and who:
  - is a member of an Indian nation/tribe; or
  - is eligible for membership in an Indian nation/tribe; or
  - is the biological child of a member of an Indian nation/tribe and is residing on, or is domiciled within, an Indian reservation.

## What Does Tribal Enrollment Mean?

- Tribal rolls are the official record of legal status for Native American people.
- Being on the tribal rolls of a Native American nation/tribe is equivalent to citizenship in that nation/tribe.
- Every tribal government determines its own rules of enrollment criteria.
- The United States government maintains the tribal rolls through a cooperative arrangement with each Native American tribe.

## How Do I Know if a Child Is Eligible for Tribal Membership?

- Ask the child's family if they are aware of any tribal affiliation.
- Find out if a parent or grandparent has a tribal enrollment card.
- Develop a family tree indicating the mother's and grandmother's maiden names and the names of the father and paternal grandparents.
- Call the Tribal Office directly.

## What About Clan Identification?

Clan identification can assist caseworkers in identifying extended family members for placement:

- Clans are matrilineal and identify traditional kinship resources.
- The clans of the Haudenosaunee (Iroquois) are Bear, Beaver, Deer, Eel, Hawk, Heron, Snake, Turtle, and Wolf.
- The caseworker should ask if the family member knows the name of their clan.

## Facts:

- There are nine recognized Native American nations/tribes in New York State and over 560 federally recognized tribes in the United States.
- The majority of Native Americans living in New York State do not reside on reservations. They live in rural areas as well as large urban centers, with an estimated 52,000 living in New York City and on Long Island.
- The New York State Office of Children and Family Services (OCFS) Native American Services office maintains a current list of tribal contacts who can assist you: (716) 847-3123.

\*The provisions of the federal Multicultural Placement Act (MEPA) do not affect the application of ICWA.

# New York State Statutory and Regulatory Requirements to Implement the Federal Indian Child Welfare Act

## Notification Requirements

**OCFS Regulation, 18 NYCRR 431.18 (c)**

The social services district, in any child custody proceeding initiated by the district pursuant to Section 384-b of the Social Services Law or Article 7\* or 10 of the Family Court Act, is required to notify the child's parent or Indian custodian and the child's Indian nation/tribe, by registered mail, of the pending proceeding and of their right to intervention. If the identity or location of the parent or Indian custodian and the nation/tribe cannot be determined, notice must be given by registered mail to the New York State Office of Children and Family Services (listed on p. 4) and to the federal government at this address:

U.S. Department of the Interior  
Eastern Regional Office  
Bureau of Indian Affairs  
545 Marriot Drive, Suite 700  
Nashville, TN 37214

*Note: Because the ICWA notification requirements apply to "involuntary proceedings," Article 7 cases are included.*

## Tribal Notification Procedures

The contents of such notification of the child custody proceeding must include all of the following information:

- The child's name, date of birth, and place of birth.
- The child's tribal affiliation, if known.
- The names of the child's parents, dates of birth of the child's parents, places of birth of the child's parents, the child's mother's maiden name.
- A copy of the petition filed with the court.
- A statement of the rights of the biological parents/custodians to intervene in the proceeding.
- A statement of right under federal law to court appointed counsel.
- The location, mailing address, and telephone number of the court.

## Qualified Expert Witness

**OCFS Regulation, 18 NYCRR 431.18 (a) and (b)**

This section states that the testimony of a qualified expert witness is required in any foster care placement and in any proceeding for the termination of parental rights. This witness is defined as a person who is qualified to speak on whether continued custody by the parents of an Indian child or an Indian custodian is likely to result in serious physical or emotional injury to the child.

## Reasonable Efforts to Prevent Placement of an Indian Child

ICWA requires that in any child custody proceeding initiated by the social services district pursuant to Section 358-a or 384-b of the Social Services Law or Article 7 or 10 of the Family Court Act, which involves an Indian Child, the social services district must demonstrate that **active efforts** have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

## Foster Care Placement Preferences

**OCFS Regulation, 18 NYCRR 431.18 (f) (1)**

An authorized agency providing foster care to an Indian child in the absence of good cause to the contrary is required to place the child with:

- First**, a member of the child's extended family;
- Second**, a foster home certified, approved or specified by the Indian child's nation/tribe and approved by the appropriate social services district;
- Third**, an Indian foster home certified or approved by an authorized agency to provide foster care services; or
- Fourth**, an institution for children approved by an Indian tribe or operated by an Indian organization which has a program to meet the needs of the child.

*Note: The nation/tribe may establish a different order of preference by tribal resolution.*

## Adoption Placement Preferences

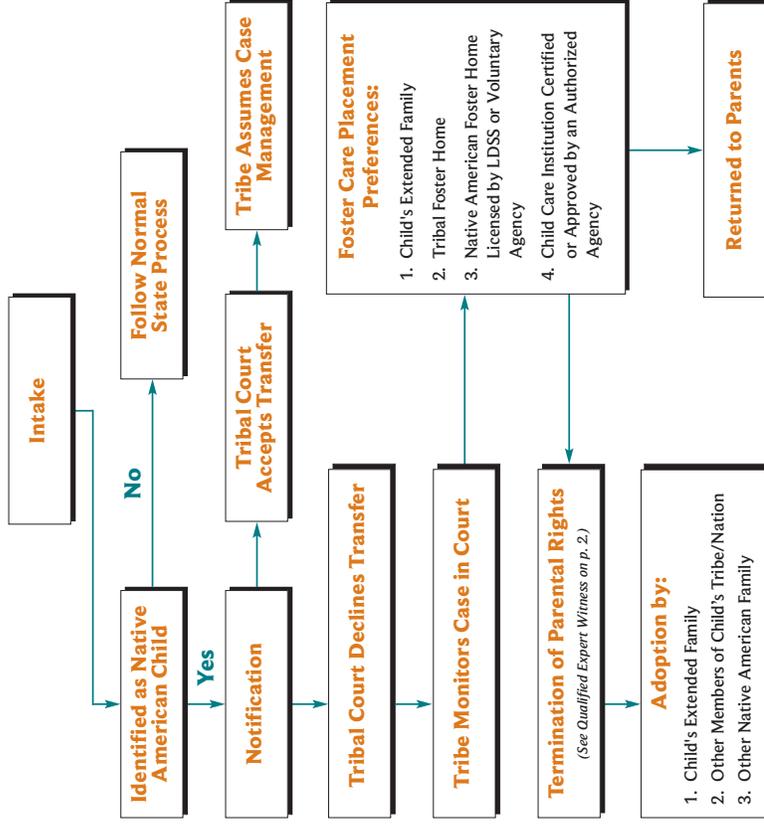
**OCFS Regulation, 18 NYCRR 431.18 (g) (1).**

This section establishes a required order of preference in an adoptive placement of an Indian child. An authorized agency providing adoption services to an Indian child is required, in the absence of good cause to the contrary, to place the child with:

- First**, a member of the child's extended family;
- Second**, other members of the child's Indian nation/tribe; or
- Third**, other Indian families.

*Note: The nation/tribe may establish a different order of preference by tribal resolution.*

# Indian Child Welfare Process



## Coding Guidelines

Once a child has been identified as a Native American child, it is necessary to identify the child as a Native American child in WMS and CCRS. When encoding the WMS Services Application, child welfare workers should enter **04 (Indian on NYS Reservation)** under the State Charge Field (SF). If any children in the WMS Services Case are to be tracked in CCRS (meaning that they would be in receipt of protective, adoptive, or foster care services), enter **1** under the Ethnicity column. These children would also be in CONNECTIONS, where "Native American" should be checked in their Person Demographics.

Systems questions should be directed to **OCFS IT Operations:**

**1 (800) 342-3727**

REGISTERED OR CERTIFIED MAIL/ RETURN RECEIPT REQUESTED

Date:  
Docket #

(Parent or Indian Custodian/Tribal or Nation Address)

Dear: Parent or Indian Custodian/Tribe or Nation

Pursuant to the federal Indian Child Welfare Act of 1978 (25 USC 1912), the ..... Department of Social Services (or the New York City Administration for Children's Services, as petitioner in the above proceeding, gives notice to .....(Child's Parent or Indian Custodian/the Tribe or Nation) of a child custody proceeding now pending in the court named below.

The name and address of petitioner's attorney is .....

A hearing in this proceeding has been scheduled for at before the Honorable , Judge. The name, mailing address and phone number of the courthouse are: .

The name of the child(ren) in question is , born on in . It is believed that is a member of or eligible for membership in the Tribe/ Nation or is the biological child of a member of the Tribe/ Nation who resides or is domiciled within an Indian reservation. (List the name of each such Tribe/Nation.)

Father (including former names or aliases) : , born on in  
Address: (Tribe/ Nation enrollment number, if known)

Mother (including maiden, married, former names or aliases) : , born on in  
Address: (Tribe/ Nation enrollment number, if known)

Indian custodian(s): (where applicable)  
Address: .

The name, mailing address and phone numbers of all parties to this proceeding not noted above are .....

Attached is additional information regarding the child ancestry, including names, birth places and tribal enrollment information of the direct lineal ancestors of the child, for example, grandparents.

Attached is a copy of the petition, complaint or other document filed with the court to initiate the child custody proceeding

ICWA Rights

The right of any parent or Indian custodian of the child, if not already a party to the child custody proceeding, to intervene in the proceedings.

The right of the child’s Indian Tribe/Nation to intervene at any time in a court proceeding for the foster care placement (exclusive of a juvenile delinquent proceeding) or termination of parental rights of an Indian child.

If the Indian child’s parent or Indian custodial is unable to afford legal counsel based on a determination of indigency by the court, the right of the parent or the Indian custodian to court appointed counsel.

The right of the parent, Indian custodian or the Indian Tribe/Nation to be granted, upon request, up to twenty (20) additional days to prepare for the child custody proceeding.

The right of the parent, or Indian custodian and the Indian child’s Tribe/Nation to petition the court for transfer of the foster care placement or termination of parental rights proceeding to Tribal Court as provided by the Indian Child Welfare Act (25 U.S.C. §1911) and federal regulation (25 CR §23.115).

All parties must keep confidential the information contained in this notice and this notice should not be handled by anyone not needing the information to exercise rights under the Indian Child Welfare Act.

Be advised that the above referenced proceeding may have significant legal consequences on the future visitation, custodial and parental rights of the parent or Indian custodial of the child(ren) referenced above.

In accordance with 25 CFR §23.111(e) and 18 NYCRR 431.18(c), the ..... Department of Social Services (or New York City Administration for Children’s Services) is hereby requesting the assistance of the Bureau of Indian Affairs and the New York State Office of Children and Family Services in the location and identification of the Indian child’s parent or Indian custodian and/or the child’s Indian Tribe/Nation checked below.

- Indian child’s parent(s):
  - Father (See demographics stated above)
  - Mother (See demographics stated above)
- Indian custodian (See mane and address above)
- Indian tribe/nation

Not applicable

If you need more information, call me at ( )  
would be most appreciated.

. Your earliest response

Respectfully,

Caseworker

Attorney

cc: New York State Office of Children  
and Family Services  
Native American Services  
295 Main Street  
Buffalo, New York 14203

U.S. Department of Interior,  
Eastern Regional Office  
Bureau of Indian Affairs  
545 Mariott Drive, Suite 700  
Nashville, T.N. 37214

attachment



FAMILY COURT OF THE STATE OF NEW YORK  
COUNTY OF

.....  
In The Matter of a Proceeding for  
Custody Visitation under Article 4 5 6  
of the Family Court Act or Section 240  
of the Domestic Relations Law

Petitioner  
Relationship to child:

Family File No.  
Docket No.  
PETITION  
 CUSTODY  VISITATION

-against-

Respondent  
Relationship to child:

.....  
TO THE FAMILY COURT:

The Petitioner respectfully alleges upon information and belief that:

1. The name, gender, current address and date of birth of each child who is the subject of this proceeding are as follows [specify address or indicate if ordered to be kept confidential pursuant to Family Court Act §154-b(2) or Domestic Relations Law §254]:

<u>Name</u>	<u>Gender</u>	<u>Date of Birth</u>	<u>Current Address</u>	<u>Name of Person with Whom Child Resides</u>
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2. a. Petitioner, \_\_\_\_\_, [check applicable box]:  resides  is located at [specify address or indicate if ordered to be kept confidential pursuant to Family Court Act §154-b(2) or Domestic Relations Law §254]:

b. Petitioner is [specify relationship to child; if foster parent, agency, institution or other relationship, so state]:

3. a. Respondent, \_\_\_\_\_, [check applicable box]:  resides  is located at [specify address or indicate if ordered to be confidential, pursuant to Family Court Act §154-b(2) or Domestic Relations Law §254]:

b. Respondent is [specify relationship to child; if foster parent, agency, institution or other relationship, so state]:

4. [Check box if applicable, o0r if not, SKIP to ¶5]  (Upon information and belief) For any

1 Note: If a custody or visitation proceeding is pending in, or an order of custody or visitation has been issued by, a court outside of the State of New York, including a Native-American tribunal, the custody/visitation petition for proceedings under the *Uniform Child Custody Jurisdiction and Enforcement Act*, Form UCCJEA-1 should be utilized instead of this form. If a prior order of custody or visitation had been entered by a Court of this State, the petition for modification or enforcement, General Forms 40 or 41, should be used instead of this form.

child listed in ¶(1) above who resided at the current address and/or with the current person for two years or less, specify where and with whom the child lived during the two years prior to that time [specify address or indicate if ordered to be kept confidential pursuant to Family Court Act §154-b(2) or Domestic Relations Law §254]:

<u>Name of Child</u>	<u>Child's Address</u>	<u>Duration (from/to)</u>	<u>Name of Person With Whom Child Resided</u>	<u>Current Address of the Person With Whom Child Resided</u>
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**5. [Applicable when Petitioner and/or Respondent is on active military duty or has recently returned from active military service; check box(es) if applicable, or if not, SKIP to Paragraph 6]:**

a.  Petitioner is on active duty, deployed or temporarily assigned to military service as follows [specify type of service, military branch or National Guard unit, anticipated dates and location of duty and how duty is likely to affect custody or visitation, if at all]:<sup>2</sup>

Petitioner returned from active duty, deployment or temporary assignment to military service as follows [specify date of return, type of service, military branch or National Guard unit and how return from duty is likely to affect custody or visitation, if at all]:

b.  Respondent is on active duty, deployed or temporarily assigned to military service as follows [specify type of service, military branch or National Guard unit and how return from duty is likely to affect custody or visitation, if at all]:<sup>3</sup>

Respondent returned from active duty, deployment or temporary assignment to military service as follows [specify date of return, type of service, military branch or National Guard unit, anticipated dates and location of duty and how duty is likely to affect custody or visitation, if at all]:

**6. [Check box(es) if applicable; or if not, SKIP to Paragraph 7]:**  An order was issued by Court, County, State of , referring the issue of  custody  visitation to the Family Court of the State of New York in and for the County of [specify]:

**7. [Check applicable box(es)]:**

a.  The father of the child(ren) who (is)(are) the subject(s) of this proceeding is [specify]:  
 The father was married to the child(ren)'s mother at the time of the conception or birth.  
 An order of filiation was made on [specify date and court and attach true copy]:  
 An acknowledgment of paternity was signed on [specify date]: by [specify who signed and attach a true copy]:  
 The father is deceased.

b.  The father of the child(ren) who (is)(are) the subject(s) of this proceeding has not been legally established.

<sup>2</sup> Inapplicable if Petitioner is based at a permanent duty station or has had a permanent reassignment of station.

<sup>3</sup> Inapplicable if Respondent is based at a permanent duty station or has had a permanent reassignment of station.

c.  A paternity agreement or compromise, pursuant to former Family Court Act §516,<sup>4</sup> was approved by the Family Court of \_\_\_\_\_ County on \_\_\_\_\_, \_\_\_\_\_, concerning [name parties to agreement or compromise] and child(ren):  
A true copy of the agreement or compromise is attached to this petition.

8. **[Applicable to cases in which either parent is not a party; check box if applicable, or if not, SKIP to Paragraph 9]:**  The name and address of a parent or parents who are not parties to this proceeding are: [specify; indicate if deceased or if address(es) ordered to be kept confidential pursuant to Family Court Act §154-b(2) or Domestic Relations Law §254]:

9. **[Check box if applicable, or if not, SKIP to Paragraph 10]:**  Petitioner has participated as a  party  witness  other capacity [specify]: \_\_\_\_\_ in other litigation concerning the custody of the same children in  New York State  Other jurisdiction [specify]:<sup>5</sup>  
If so, specify type of case, type of participation, court, location and status of case.

10. a. A custody or visitation proceeding concerning the same child(ren)  is  is not pending in New York State. [If pending, give court docket number and status of case]:

b. A custody or visitation proceeding concerning the same child(ren)  is  is not pending in a jurisdiction outside New York State. [If pending, specify where, court docket number and status of case]:

11. **[Check box if applicable, or if not, SKIP to Paragraph 12]:**  The custody or visitation of the child(ren) has been agreed upon in the following custody, separation or guardianship agreement, dated [specify, and attach copy]:

12. **[Check box(es) if applicable, or if not, SKIP to Paragraph 13]:**

a.  Petitioner  Respondent obtained custody of the child(ren) on [specify date]: \_\_\_\_\_, as follows:

b.  Petitioner  Respondent obtained visitation with the child(ren) on [specify date]: \_\_\_\_\_, as follows:

13. It would be in the best interests of the child(ren) for Petitioner to have  custody  visitation for the following reasons [specify]:

14. **[Check box(es) if applicable, or if not, SKIP to Paragraph 15]:**

a.  An Order of Protection or Temporary Order of Protection was issued [check applicable

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4 The agreement or compromise must have been signed prior to the repeal of FCA §516 on May 19, 2009.

5 If litigation occurred in Native-American tribunal, so indicate.

box(es):  against Respondent  against me in the following criminal, matrimonial and/or Family Court proceeding(s) [specify the court, docket or index number, date of order, next court date and status of case, if available]:

The  Order of Protection  Temporary Order of Protection expired or will expire on [specify date ]:

b.  Petitioner requests a Temporary Order of Protection pursuant to Family Court Act §655 because [specify]:

15. [Applicable where one or more parties are not parents of the child(ren); if not, SKIP to Paragraph 16]: The subject child(ren)  are  are not Native-American child(ren) who may be subject to the *Indian Child Welfare Act* (25 U.S.C. §§ 1901-1963).

16. INSERT ADDENDUM where a child abuse, child neglect or destitute child petition and/or a permanency hearing report has been filed regarding the child(ren) and in which Petitioner is a Respondent parent, Non-respondent parent, relative or other non-parent; if not, SKIP to Paragraph 17].

17. No previous application has been made in any court, including a Native-American tribunal, or to any judge for the relief herein requested, (except:

WHEREFORE, Petitioner requests an order awarding  custody  visitation of the child(ren) to the Petitioner and for such other and further relief as the Court may determine.

Dated:

\_\_\_\_\_  
Petitioner

\_\_\_\_\_  
Print or type name

\_\_\_\_\_  
Signature of Attorney, if any

\_\_\_\_\_  
Attorney's Name (Print or Type)

\_\_\_\_\_  
Attorney's Address and Telephone Number

VERIFICATION

STATE OF NEW YORK )

:ss:

COUNTY OF )

being duly sworn, says that (s)he is the Petitioner in the above-named proceeding and that the foregoing petition is true to (his)(her) own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters (s)he believes it to be true.

\_\_\_\_\_  
Petitioner

Sworn to before me this  
day of

\_\_\_\_\_  
(Deputy) Clerk of the Court  
Notary Public

**ADDENDUM (Paragraph 16)**

**[REQUIRED where a child abuse, child neglect or destitute child petition and/or a permanency hearing report has been filed regarding the child(ren) and where Petitioner is a Respondent parent, Non-respondent parent, relative or other non-parent; check applicable box(es)]:**

a.  A child protective petition, Docket # [specify]: \_\_\_\_\_, was filed in Family Court, [specify county]: \_\_\_\_\_ on [specify date]: \_\_\_\_\_ alleging that [specify names of respondents on that petition]: \_\_\_\_\_

neglected or abused the above-named child(ren). The petition resulted in [specify whether finding was made and, if so, the disposition; if the disposition has been adjourned pending a consolidated hearing with this petition, pursuant to F.C.A. §1055-b, so indicate and give next court date]: \_\_\_\_\_

b.  A destitute child petition, Docket # [specify]: \_\_\_\_\_, was filed in Family Court, [specify county]: \_\_\_\_\_ on [specify date]: \_\_\_\_\_. The petition resulted in [specify whether finding was made and, if so, the disposition; if the disposition has been adjourned pending a consolidated hearing with this petition, pursuant to F.C.A. §1096, so indicate and give next court date]: \_\_\_\_\_

c.  A permanency report, Docket # [specify]: \_\_\_\_\_, pursuant to Article 10-A of the Family Court Act, was filed in Family Court, [specify county]: \_\_\_\_\_ on [specify date]: \_\_\_\_\_ indicating a permanency plan of custody of the child(ren) with Petitioner in this proceeding. The permanency hearing was adjourned to [specify date]: \_\_\_\_\_ pending a consolidated hearing with this petition, pursuant to F.C.A. §1089-a.

d.  Termination of the order placing or remanding the child(ren) pursuant to Article 10, 10-A or 10-C of the Family Court Act will not jeopardize the child(ren)'s safety, will provide the child

with a safe and permanent home and is in the best interests of the child(ren) for the following reasons [specify]:.

**[Applicable to cases where Petitioner is a Respondent or a Non-respondent parent in a child protective or destitute child dispositional or permanency planning proceeding and where the hearing in the child custody matter was consolidated with the child protective or destitute child dispositional or permanency hearing, pursuant to F.C.A. §§1055-b, 1089-a or 1096; check box(es) if applicable]:**

e. The child’s other parent  has  has not consented to custody with the Petitioner.

f. The following non-parent [specify]: \_\_\_\_\_ of the child  has  has not objected to custody with Petitioner. If objecting to custody, the non-parent has not demonstrated extraordinary circumstances.

**[Applicable to cases where Petitioner is a relative or other non-parent, who appeared in a child protective or destitute child dispositional or permanency proceeding and where the hearing in the child custody matter was consolidated with the child protective or destitute child dispositional or permanency hearing, pursuant to F.C.A. §§1055-b, 1089-a or 1096; check box(es) if applicable]:**

g. The child’s birth mother  has  has not consented to the award of custody to the Petitioner. If not, the following extraordinary circumstances support Petitioner’s standing to seek custody of the child(ren) [specify]:

h. The child’s legally-established birth father  has  has not consented to the award of custody to the Petitioner. If not, the following extraordinary circumstances support Petitioner’s standing to seek custody of the child(ren) [specify]:

i. The child has been living with the following foster parent(s)[specify]: \_\_\_\_\_ since [specify date]: \_\_\_\_\_ The foster parent(s)  has/have  has/have not consented to the award of custody to the Petitioner. [If unaware whether they have consented, so state]:

j. The local department of social services [specify]: \_\_\_\_\_ in the related  child abuse or neglect  destitute child  permanency proceeding  has  has not consented to the award of custody to the Petitioner. [If unaware whether they have consented, so state]:

k. The attorney for the child(ren) [specify]: \_\_\_\_\_ in the related  child abuse or neglect  destitute child  permanency proceeding  has  has not consented to the award of custody to the Petitioner. [If unaware whether he or she has consented, so state]:

FAMILY COURT OF THE STATE OF NEW YORK  
COUNTY OF

.....  
In the Matter of a Proceeding [specify]  
under [specify statute]:

Docket No.

Child's Name:  
Date of Birth:

PETITION  
FOR TRANSFER OF  
PROCEEDING CONCERNING  
AN INDIAN CHILD

.....  
TO THE FAMILY COURT

The undersigned Petitioner respectfully alleges upon information and belief that:

1. The child, [specify]: \_\_\_\_\_, is an Indian child, as defined in subdivision 36 of section 2 of the Social Services Law, and is the subject of the above-entitled proceeding for:
- foster care placement       child abuse or neglect       person in need of supervision
  - termination of parental rights       destitute child       surrender
  - adoption       custody to a non-parent

2. a. I am the [check applicable box]:  father    mother    Indian custodian of the child
- Chief of the [specify tribe or nation]: \_\_\_\_\_
  - Other representative of the tribe or nation [specify title and tribe or nation]: \_\_\_\_\_
  - Commissioner of Social Services of the County of [specify]: \_\_\_\_\_
  - Commissioner of the New York City Administration for Children's Services

b. I reside at [specify address]:<sup>1</sup> \_\_\_\_\_, which  is  is not located within the tribal reservation or tribal lands .

3. The child is:  a member    eligible to be a member    a child of a member<sup>2</sup> of the following tribe or nation [specify]: \_\_\_\_\_, a tribe or nation recognized by the
- Bureau of Indian Affairs, US Dept. of Interior    State of New York    Other state [specify]: \_\_\_\_\_

4. [Check applicable box(es)]:

- a.  The tribe or nation has exclusive jurisdiction over this proceeding because the child is:
- a Native-American child who is domiciled or residing within the tribal reservation or tribal lands

\_\_\_\_\_  
<sup>1</sup> Unless the Court has ordered the address to be confidential on the ground that disclosure would pose an unreasonable health or safety risk. See Family Court Act §154-b; Form 21 (available at [www.nycourts.gov](http://www.nycourts.gov)). If Petitioner is the Commissioner, indicate agency address.

<sup>2</sup> The parent member includes: birth mother, father married to birth mother at time of the birth or father who signed an acknowledgment of paternity or obtained an order of filiation and Native-American adoptive parent of a Native-American child. See 25 U.S.C. §1903(9).

a Native-American child who is a ward of the court of a tribe or nation.

b. The child is NOT:

a Native-American child who is domiciled or residing within the tribal reservation or tribal lands

a Native-American child who is a ward of the court of a tribe or nation.

5. [Check applicable box]: Upon information and belief:

The tribe or nation consents to the transfer of this proceeding.

The tribe or nation does not consent to the transfer of this proceeding.

The tribe or nation is not taking a position regarding the transfer of this proceeding.

I do not know whether the tribe or nation will consent to the transfer of this proceeding.

WHEREFORE, Petitioner requests the transfer of the proceeding to the jurisdiction of the Indian tribe or nation and for such other and further relief as the Court may determine.

Dated: , .

\_\_\_\_\_  
Petitioner

\_\_\_\_\_  
Print or type name

\_\_\_\_\_  
Signature of attorney, if any

\_\_\_\_\_  
Attorney's Name (Print or Type)

\_\_\_\_\_

\_\_\_\_\_  
Attorney's Address and Telephone Number

VERIFICATION

STATE OF NEW YORK )

)SS.:

COUNTY OF )

being duly sworn, says that (s)he is the Petitioner in the above-named proceeding and that the foregoing petition is true to (his)(her) own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters (s)he believes it to be true.

\_\_\_\_\_  
Petitioner

Sworn to before me this  
day of ,

\_\_\_\_\_  
(Deputy)(Clerk) of the Court  
Notary Public

At a term of the Family Court of the State of New York  
held in and for the County of \_\_\_\_\_,  
at \_\_\_\_\_ New York  
on \_\_\_\_\_, \_\_\_\_\_.

PRESENT:

Hon.  
Judge

\_\_\_\_\_  
In the Matter of a Proceeding under  
Article \_\_\_\_\_ of the

Docket No. \_\_\_\_\_

Child's Name:  
Date of Birth:

ORDER DETERMINING PETITION OR  
REQUEST FOR TRANSFER OF  
PROCEEDING CONCERNING  
AN INDIAN CHILD

\_\_\_\_\_  
A petition having been filed or oral application having been made in this Court requesting transfer  
of the following proceeding concerning the child to the jurisdiction of the Indian tribe or nation:

- [Check applicable box]:
- |  |   |
|--|---|
| <input type="checkbox"/> foster care placement         | <input type="checkbox"/> child abuse or neglect         |
| <input type="checkbox"/> person in need of supervision | <input type="checkbox"/> termination of parental rights |
| <input type="checkbox"/> destitute child               | <input type="checkbox"/> surrender                      |
| <input type="checkbox"/> adoption                      | <input type="checkbox"/> custody to a non-parent        |

And this Court having determined that the child [check all applicable box(es)]:<sup>2</sup>

- is is not a member
- is is not eligible to be a member
- is is not a child of a member<sup>3</sup>
- is is not a Native-American child domiciled or residing on the tribal reservation or tribal lands
- is is not a Native-American child who is a ward of the court of a tribe or nation

\_\_\_\_\_  
<sup>1</sup> A request for transfer to a tribal court may be made orally or by petition. 25 U.S.C. §1911(b); Bureau of Indian Affairs,, U.S. Dept. of the Interior, *Guidelines for State Courts: Indian Child Custody Proceedings* C1, Fed. Register (Nov. 26, 1979); S.S.L. §39(6).

<sup>2</sup> Where a Native-American child is domiciled or residing on tribal or nation reservation or lands and where the tribal court exercises exclusive jurisdiction over child custody matters and/or the child is a ward of the court of the tribe or nation, the tribe or nation has exclusive jurisdiction and transfer is mandatory. *See* Bureau of Indian Affairs, US Dept. of the Interior, *guidelines for State Courts: Indian Child Custody Proceedings* ¶B-4, *Fed. Reg.* (Nov. 26, 1979).

<sup>3</sup> The parent member includes: birth mother, father married to birth mother at time of the birth or father who signed an acknowledgment of paternity or obtained an order of filiation and Native-American adoptive parent of a Native-American child. *See* 25 U.S.C. §1903(9).

of the following tribe or nation [specify]: \_\_\_\_\_, a tribe or nation recognized<sup>4</sup> by the  Bureau of Indian Affairs, US Dept.of Interior  State of New York  Other state [specify]:

And this Court having determined that [check applicable box]:

there is no good cause to deny the transfer

OR

the following good cause exists to deny the transfer [specify]:

And that an objection to the transfer:  has  has not been filed by the child’s mother;  
 has  has not been filed by the child’s father;

And that with respect to the transfer of this proceeding, the tribe or nation [check applicable box]:  
 consents  does not consent  has not taken a position  has not conveyed a position to the Court.

And the matter having duly come on to be heard before this Court,  
NOW, after examination and inquiry into the facts and circumstances of the case, it is hereby  
[Check applicable box]:

ORDERED that the petition or application for transfer of the proceeding to the jurisdiction of the Indian tribe is hereby GRANTED and the proceeding is so transferred, subject to declination by the tribal court;

OR

ORDERED that the petition or application for transfer of the proceeding to the jurisdiction of the Indian tribe is hereby DENIED and the petition for transfer is dismissed;

AND IT IS FURTHER ORDERED that [specify]:

PURSUANT TO SECTION 1113 OF THE FAMILY COURT ACT, AN APPEAL FROM THIS ORDER MUST BE TAKEN WITHIN 30 DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT, 35 DAYS FROM THE DATE OF MAILING OF THE ORDER TO APPELLANT BY THE CLERK OF COURT, OR 30 DAYS AFTER SERVICE BY A PARTY OR THE ATTORNEY FOR THE CHILD UPON THE APPELLANT, WHICHEVER IS EARLIEST.

ENTER

\_\_\_\_\_  
Judge of the Family. Court.

Dated:

Check applicable box:

- Order mailed on [specify date(s) and to whom mailed ]:\_\_\_\_\_
- Order received in court on [specify date(s) and to whom given]:\_\_\_\_\_

\_\_\_\_\_  
<sup>4</sup> All tribes and nations in New York State are recognized by both the federal Bureau of Indian Affairs and New York State except the Unkechaug Nation, which is recognized only by New York State. A directory of the 565 federally recognized tribes is available on-line at:  
<http://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/index.htm>



Notary Public

At a term of the Family Court of the State of New York,  
held in and for the County of \_\_\_\_\_,  
at \_\_\_\_\_, New York, on \_\_\_\_\_, \_\_\_\_\_.

P R E S E N T:

Hon.  
Judge

.....  
In the Matter of

CIN #

Docket No.  
ADDENDUM TO ORDER— FINDINGS OF  
FACT AND CONCLUSIONS OF LAW --  
*INDIAN CHILD WELFARE ACT*

.....  
An order having been issued by this Court, dated {specify}: \_\_\_\_\_, involving  
an unmarried child under the age of 18 (or a foster child under 21 who entered foster care before the age  
of 18), who may be covered by the *Indian Child Welfare Act*, 25 U.S.C. §§1901-1963, in which [check  
applicable box(es)]:

- the child is placed in out-of-home care pursuant to a:
  - Person In Need of Supervision proceeding [Article 7 of the Family Court Act]
  - Child protective proceeding [Article 10 of the Family Court Act]
  - Destitute child proceeding [Article 10-C of the Family Court Act]
  - Voluntary placement proceeding [Social Services Law §358-a]
  - Permanency hearing [Article 10-A of the Family Court Act]
- custody of the child is granted to a non-parent pursuant to section 651, *et seq.*, of the Family  
Court Act or section 72 of the Domestic Relations Law;
- parental rights to the child are terminated pursuant to section 634 of the Family Court Act or  
section 384-b of the Social Services Law;

\_\_\_\_\_  
<sup>1</sup> ***An Addendum to the main order using this form must be issued in all cases in which the Family  
Court retains jurisdiction and issues an order involving an unmarried child under the age of 18 (or a foster  
child under 21 who entered care before the age of 18), who may be covered by the Indian Child Welfare Act,  
25 U.S.C. §§1901-1963, in which :***

- *the child is placed in out-of-home care under Articles 7, 10, 10-A or 10-C of the Family Court Act  
or section 358-a of the Social Services Law; or*
- *custody of the child is granted to a non-parent pursuant to section 651, et seq., of the Family Court  
Act; or section 72 of the Domestic Relations Law;*
- *parental rights are terminated pursuant to section 634 of the Family Court Act or section 384-b of  
the Social Services Law or are surrendered pursuant to section 383-c or 384 of the Social Services Law; or*
- *the child is adopted pursuant to section 114 or 116 of the Domestic Relations Law; or*
- *a guardian is appointed for the child pursuant to section 661 of the Family Court Act.*

- parental rights to the child are surrendered pursuant to section 383-c or 384 of the Social Services Law;
- the child is adopted pursuant to section 114 or 116 of the Domestic Relations Law;
- a guardian is appointed for the child pursuant to the Family Court Act or the Surrogate's Court Procedure Act.

And the following having been duly notified [check applicable box(es)]:

- parent(s)/caretaker(s) [REQUIRED]       tribe/nation [REQUIRED]
- United States Secretary of the Interior [REQUIRED if tribal contact undetermined];

And the tribe/nation having [check all applicable box(es)]:

- appeared and participated as a party;
- responded to the notice but did not appear;
- neither responded to the notice nor appeared;

And the Court, after hearing the proof and testimony offered in relation to the case, finds and determines the following as required by the *Indian Child Welfare Act*, 25 U.S.C. §§1901-1963:

1. The child's tribe or nation is [specify]:

This tribe or nation is [check applicable box(es)]:

- recognized by the US Bureau of Indian Affairs
- not recognized by the US Bureau of Indian Affairs or New York State
- recognized by New York State but not by the US Bureau of Indian Affairs<sup>2</sup>
- recognized by another state [specify]:

2. [Check all applicable box(es), if any]:

- The child is enrolled as a member of the tribe or nation.
- The child is eligible for enrollment as a member of the tribe or nation.
- The child's biological and/or legal parent<sup>3</sup> is a member of the tribe or nation and is
  - domiciled or resides     neither domiciled nor resides    on the reservation or tribal land.
- The child is Native-American and resides or is domiciled on the reservation or tribal land.
- The child is is Native-American and is a ward of the court of the tribe or nation.
- Information regarding the child's tribal status is unknown but the child may be subject to the

*Indian Child Welfare Act* for the following reason(s)[specify]:

3. a) The tribe or nation has taken the following position [check applicable box(es)]:

- requested transfer of jurisdiction;<sup>4</sup>

<sup>2</sup> Note: *Unkechaug Nation only.*

<sup>3</sup> "Biological and/or legal parent" includes: the birth mother, father married to birth mother at time of the birth or father who signed an acknowledgment of paternity or obtained an order of filiation and Native-American adoptive parent of a Native-American child. *See* 25 U.S.C. §1903(9).

<sup>4</sup> Requests for transfer may be made orally on the record or by petition (General Form GF-19) and an order determining the request must be issued using General Form GF-20. Where a Native-American child is domiciled or residing on a tribal or nation reservation or land and where the tribal court exercises exclusive jurisdiction over child custody matters and/or the child is a ward of the court of the tribe or nation, the tribe or nation has exclusive jurisdiction and transfer is mandatory. *See* Bureau of Indian Affairs, ~~199~~ Dept. of the Interior, *Guidelines for State Courts: Indian*

- declined to assume jurisdiction;
- other [specify tribe's or nation's position]:

b)  The tribe or nation has not taken a position.

**4. [REQUIRED where child is placed out of the home pursuant to Article 7, 10, 10-A or 10-C of the Family Court Act or Social Services Law §358-a; if not, SKIP; check applicable box(es)]:**

a. The agency in whose custody the child resides:

has made the following active efforts to prevent the placement of the child [specify]:

has not made active efforts to prevent the placement of the child.

b.  The placement of this child is supported by clear and convincing evidence, including the testimony of one or more Qualified Expert Witnesses, that retention of the child in the home would be likely to result in serious emotional or physical damage to the child.

c.  The Court's placement of this child out of the home is made in accordance with the foster care placement preferences of the *Indian Child Welfare Act* in that [specify]:<sup>5</sup>

The following good cause supported a departure from the foster care placement preferences of the *Indian Child Welfare Act* [specify]:

**5. [REQUIRED where the child is placed or continued in foster care placement as a result of a permanency hearing or termination of parental rights; if not, SKIP; see 25 U.S.C. §1912(d)]:**

The agency in whose custody the child resides:

has made the following active efforts to provide remedial services and programs designed to prevent the breakup of the Indian family, but the efforts have proven unsuccessful [specify]:

has not made active efforts to provide remedial services and programs designed to prevent the breakup of the Indian family.

**6. [REQUIRED where the child's parental rights are terminated pursuant to Social Services Law § 384-b or Family Court Act §§631( c), 634 ; if not, SKIP]:**

The Court's order terminating parental rights is based upon proof beyond a reasonable doubt, including the testimony of one or more Qualified Expert Witnesses, that returning custody to the parent(s) would be likely to result in serious emotional or physical damage to the child.

---

*Child Custody Proceedings* ¶B-4, *Fed. Reg.* (Nov. 26, 1979); Social Services Law §39; 25 U.S.C. §1911.

<sup>5</sup> Foster care placements must be in the least restrictive, most homelike setting that meets the child's special needs and that are as close as possible to the child's home, taking such needs into account. Unless the tribe or nation establishes otherwise, The order of preference for a foster care placements is: (i) a member of the child's extended family; (ii) a foster home certified, specified or approved by the tribe or nation and approved by the local social services district; (iii) a Native-American foster home certified or approved by an authorized foster care agency; or (iv) an institution approved by a tribe or nation and operated by a Native-American organization and meeting the child's special needs. See 25 U.S.C. §1915(b); 18 N.Y.C.R.R. §431.18(f)(1). 169

**7. [REQUIRED where the parent has voluntarily surrendered the child pursuant to Social Services Law §§383-c or 384 or consented to an adoption pursuant to Domestic Relations Law §§111, 115-b(2) ; if not, SKIP]:**

The surrender or consent was executed in writing before the Court more than 10 days after the birth of the child..

By this Supplemental order, this Court hereby certifies that the terms and consequences of the surrender or consent instrument were explained to the parent in detail in the parent’s primary language and that the parent appeared to have understood the terms, including the right of the parent to withdraw the consent or surrender in writing at any time prior to issuance of an order of adoption.

**8. [REQUIRED where the child is placed in an adoptive home; if not, SKIP]:**

The Court’s placement of this child in an adoptive home is made in accordance with the adoptive placement preferences of the *Indian Child Welfare Act* in that [specify]:<sup>6</sup>

The following good cause supported a departure from the adoptive placement preferences of the *Indian Child Welfare Act* [specify]:

**[Applicable if information regarding the child’s tribal status is unknown but the child may be subject to the *Indian Child Welfare Act*, as indicated in ¶2, above; if not, SKIP]:**

NOW, THEREFORE, IT IS ORDERED that [specify]: \_\_\_\_\_, take the following actions to ascertain if the child is subject to the *Indian Child Welfare Act of 1978* and to report all actions and responses to the court and all parties by [specify date]:

AND IT IS FURTHER ORDERED that [specify]:

ENTER

\_\_\_\_\_  
Judge of the Family Court

Dated: \_\_\_\_\_

PURSUANT TO SECTION 1113 OF THE FAMILY COURT ACT, AN APPEAL FROM THIS ORDER MUST BE TAKEN WITHIN 30 DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT, 35 DAYS FROM THE DATE OF MAILING OF THE ORDER TO APPELLANT BY THE CLERK OF COURT, OR 30 DAYS AFTER SERVICE BY A PARTY OR THE ATTORNEY FOR THE CHILD UPON THE APPELLANT, WHICHEVER IS EARLIEST

Check applicable box:

Order mailed on [specify date(s) and to whom mailed ]: \_\_\_\_\_

Order received in court on [specify date(s) and to whom given]: \_\_\_\_\_

<sup>6</sup> Adoptive placements must be in the least restrictive, most homelike setting that meets the child’s special needs and that are as close as possible to the child’s home, taking such needs into account. Unless the tribe or nation establishes otherwise, the order of preference for an adoptive placements is: (i) a member of the child’s extended family; (ii) another member of the child’s Native-American tribe or nation; or (iii) another Native-American family. See 25 U.S.C. §1915(a); 18 N.Y.C.R.R. §431.18(g)(1).





FAMILY COURT OF NEW YORK  
COUNTY OF

.....  
In the Matter of

Docket No.

CIN #  
(A) Child(ren) under Eighteen Years  
of Age Alleged to be Neglected by

PETITION  
(Child Neglect)

Respondent(s)  
.....

**NOTICE: IF YOUR CHILD STAYS IN FOSTER CARE FOR 15 OF THE MOST RECENT 22 MONTHS, THE AGENCY MAY BE REQUIRED BY LAW TO FILE A PETITION TO TERMINATE YOUR PARENTAL RIGHTS AND MAY FILE BEFORE THE END OF THE 15-MONTH PERIOD. IF THE PETITION IS GRANTED, YOU MAY LOSE YOUR RIGHTS TO YOUR CHILD AND YOUR CHILD MAY BE ADOPTED WITHOUT YOUR CONSENT.**

TO THE FAMILY COURT:

The undersigned Petitioner respectfully alleges that:

- 1. Petitioner [specify]: \_\_\_\_\_ is a [check applicable box]:
  - duly authorized agency having its office and place of business at [specify]:
  - person directed by the Court to originate this proceeding, who resides at

[specify]:

- 2. The child(ren) who (is) (are) the subject(s) of this proceeding (is)(are):

<u>Name</u>	<u>Sex</u>	<u>Date of Birth</u>	<u>Custodial Parent/Guardian</u>	<u>Child's Address<sup>1</sup></u>
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- 3. a. (Upon information and belief) The father and mother of the child(ren) and their respective residence addresses are:

<u>Name of Child(ren)</u>	<u>Name of Parent</u>	<u>Parent's Address<sup>2</sup></u>
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- b. (Upon information and belief) The person(s) legally responsible for the care of said

<sup>1</sup> Unless ordered confidential, pursuant to Family Court Act §154-b, because of a risk that disclosure would place the health, safety or liberty of the child at risk.

<sup>2</sup> See footnote 1.

child(ren) (is)(are)[specify]: \_\_\_\_\_ who reside at [specify address]:<sup>3</sup>

4. (Upon information and belief) The child(ren) (is) (are) a(n) neglected on the following grounds and based upon the following facts [Specify grounds of child neglect under Family Court Act §1012, as well as supporting facts]:

5. (Upon information and belief), Respondent(s) [specify]: \_\_\_\_\_, the {specify relationship}: \_\_\_\_\_ of the child(ren), (is)(are) the person(s) who (is)(are) responsible for the neglect of the child(ren).

6. [Required if removal has occurred or is requested; check applicable box(es)]:  
 a.  (Upon information and belief) On [specify date]: \_\_\_\_\_, the following child(ren)[specify]: \_\_\_\_\_ were temporarily removed from the care of the following Respondent(s) [specify]: \_\_\_\_\_ on the basis of the following facts and for the following reasons [specify]: \_\_\_\_\_

in accordance with [check applicable box]:  
 a court order pursuant to Family Court Act §1022, issued on [specify]: \_\_\_\_\_  
 consent of the following Respondent(s) [specify]: \_\_\_\_\_ obtained on [specify date]: \_\_\_\_\_ pursuant to Family Court Act §1021.<sup>4</sup>  
 on an emergency basis without a court order pursuant to Family Court Act §1024.  
 There was no time to obtain a court order because [specify]: \_\_\_\_\_

b.  (Upon information and belief) The child(ren) should be removed from the care of the following Respondent(s) [specify]: \_\_\_\_\_ in accordance with Family Court Act §1027 in order to prevent imminent risk to the child(ren)'s life or health on the basis of the following facts and for the following reasons [specify]: \_\_\_\_\_

7. [Required if removal or continued removal of children is requested]:  
 a. (Upon information and belief) Continuation in, or return to, the child(ren)'s home would be contrary to the best interests of the child(ren) because [specify facts and reasons]: \_\_\_\_\_

This assertion is based upon the following information [check applicable box(es)]:

- Report of Suspected Child Abuse or Neglect
- Case Record, dated [specify]: \_\_\_\_\_
- Service Plan, dated [specify]: \_\_\_\_\_
- The report of [specify]: \_\_\_\_\_, dated [specify]: \_\_\_\_\_
- Other [specify]: \_\_\_\_\_

b. (Upon information and belief) Reasonable efforts, where appropriate, to prevent or eliminate the need for removal of the child(ren) from the home [check applicable box and state reasons as indicated]: \_\_\_\_\_

<sup>3</sup> See footnote 1.

<sup>4</sup> A copy of the consent instrument must be attached to the petition. See F.C.A. §1021.

- were made as follows [specify]:
- were not made but the lack of efforts was appropriate [check all applicable boxes]:
  - because of a prior judicial finding that the Petitioner was not required to make reasonable efforts to reunify the child(ren) with the Respondent(s) [specify date of finding]:
  - because [specify other reason(s)]:
- were not made.

This assertion is based upon the following information [check applicable box(es)]:

- Report of Suspected Child Abuse or Neglect
- Case Record, dated [specify]:
- Service Plan, dated [specify]:
- The report of [specify]: , dated [specify]:
- Other [specify]:

c. (Upon information and belief) Based upon Petitioner's investigation [Check applicable box(es)]:

The following person [specify]:  
is a  non-respondent parent  relative  suitable person with whom the child(ren) may appropriately reside.

[Applicable to relatives and other suitable persons]: Such person:  
 seeks approval as a foster parent in order to provide care for the child(ren);  
 wishes to provide care and custody for the child(ren) without foster care subsidy during the pendency of any order herein.  
 may be a resource but not yet determined whether as a foster parent or custodian.

There is no non-respondent parent, relative or suitable person with whom the child(ren) may appropriately reside.

d. (Upon information and belief) Imminent risk to the child(ren)  would  would not be eliminated by the issuance of a temporary order of protection or order of protection directing the removal of [specify]: from the child(ren)'s residence, based upon the following facts and for the following reasons [specify]:

8. The subject child  is  is not a Native-American child, who is subject to the Indian Child Welfare Act of 1978 (25 U.S.C. §§ 1901-1963). If so, the following have been notified [check applicable box(es)]:

- parent/custodian [specify name and give notification date]:
- tribe/nation [specify name and give notification date]:
- United States Secretary of the Interior [give notification date]:

9. [Required if removal or continued removal of children is requested]:<sup>5</sup> Petitioner is required to obtain education information and to provide that information to foster care providers and other parties to

<sup>5</sup> This notice is required by the federal *Family Educational Rights and Privacy Act* [20 U.S.C. §1232(g)(b)(2)(B)].





Name of Child(ren)

Name of Parent

Parent's Address<sup>2</sup>

b. (Upon information and belief) The person(s) legally responsible for the care of the child(ren) (is)(are) [specify]:  
who reside at <sup>3</sup>

4. a. (Upon information and belief) The child(ren) (is) (are) abused on the following grounds and based upon the following facts [Specify grounds of child abuse under Family Court Act §1012, as well as supporting facts]:

b. (Upon information and belief) The following Respondent (s) [specify]: \_\_\_\_\_, the [specify relationship]: \_\_\_\_\_ of the child(ren), (is)(are) the person(s) who (is)(are) responsible for the abuse of the child(ren).

5. a. (Upon information and belief (s) The child(ren) (is) (are) also neglected on the following grounds and based upon the following facts [Specify grounds of child neglect under Family Court Act §1012, as well as supporting facts]:

b. (Upon information and belief) The following Respondent (s) [specify]: \_\_\_\_\_, the [specify relationship]: \_\_\_\_\_ of the child(ren), (is)(are) the person(s) who (is)(are) responsible for the neglect of the child(ren).

6. a. [Applicable in cases in which severe abuse is alleged]: (Upon information and belief) The following Respondent(s) [specify]: \_\_\_\_\_ committed the following act(s) of severe abuse against the following child(ren) [specify children), act(s), including Penal Law section(s), if applicable, dates, locations, criminal convictions and other facts]:

b. [Applicable in cases in which repeated abuse is alleged](Upon information and belief) The following Respondent(s)[specify]: \_\_\_\_\_ committed the following act(s) of repeated abuse against the following child(ren) [specify child(ren), acts, including Penal Law section(s), if applicable, dates, locations, prior findings of child abuse and other facts]:

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<sup>2</sup> See footnote 1.

<sup>3</sup> See footnote 1.

7. [Required if removal has occurred or is requested; check applicable box(es)]:

a.  (Upon information and belief) On [specify date]: \_\_\_\_\_, the following child(ren)[specify]: \_\_\_\_\_ (was)(were) temporarily removed from the care of the following Respondent(s) [specify]: \_\_\_\_\_ on the basis of the following facts and for the following reasons [specify]:

in accordance with [check applicable box]:

a court order pursuant to Family Court Act §1022, issued on [specify]:

consent of the following Respondent(s) [specify]: \_\_\_\_\_ obtained on [specify date]: \_\_\_\_\_ pursuant to Family Court Act §1021.<sup>4</sup>

on an emergency basis without a court order pursuant to Family Court Act §1024. There was no time to obtain a court order because [specify]:

b.  (Upon information and belief) The child(ren) should be removed from the care of the following Respondent(s) [specify]: \_\_\_\_\_ in accordance with Family Court Act §1027 in order to prevent imminent risk to the child(ren)'s life or health on the basis of the following facts and for the following reasons [specify]:

8. [Required if removal or continued removal of children is requested]:

a. (Upon information and belief) Continuation in, or return to, the child(ren)'s home would be contrary to the best interests of the child(ren) because [specify facts and reasons]:

This assertion is based upon the following information [check applicable box(es)]:

Report of Suspected Child Abuse or Neglect

Case Record, dated [specify]:

Service Plan, dated [specify]:

The report of [specify]: \_\_\_\_\_, dated [specify]:

Other [specify]:

b. (Upon information and belief) Reasonable efforts, where appropriate, to prevent or eliminate the need for removal of the child(ren) from the home [check applicable box and state reasons as indicated]:

were made as follows [specify]:

were not made but the lack of efforts was appropriate [check all applicable boxes]:

because of a prior judicial finding that the Petitioner was not required to make reasonable efforts to reunify the child(ren) with the Respondent(s) [specify date of finding]:

because [specify other reason(s)]:

were not made.

This assertion is based upon the following information [check applicable box(es)]:

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<sup>4</sup> A copy of the consent instrument must be attached to the petition. See F.C.A. §1021.

- Report of Suspected Child Abuse or Neglect
- Case Record, dated [specify]:
- Service Plan, dated [specify]:
- The report of [specify]: , dated [specify]:
- Other [specify]:

c. (Upon information and belief) Based upon Petitioner's investigation [Check applicable box(es)]:  The following person [specify]: is a  non-respondent parent  relative  suitable person with whom the child(ren) may appropriately reside [specify]:

[Applicable to relatives and other suitable persons]: Such person:

- seeks approval as a foster parent in order to provide care for the child(ren);
- wishes to provide care and custody for the child(ren) without foster care subsidy during the pendency of any order herein.
- may be a resource but not yet determined whether as a foster parent or custodian.
- There is no non-respondent parent, relative or suitable person with whom the child(ren) may appropriately reside.

d. [Required]: (Upon information and belief) Imminent risk to the child(ren)

- would  would not be eliminated by the issuance of a temporary order of protection or order of protection directing the removal of [specify]: from the child(ren)'s residence, based upon the following facts and for the following reasons [specify]:

9. The subject child  is  is not a Native-American child, who is subject to the Indian Child Welfare Act of 1978 (25 U.S.C. §§ 1901-1963). If so, the following have been notified [check applicable box(es)]:

- parent/custodian [specify name and give notification date]:
- tribe/nation [specify name and give notification date]:
- United States Secretary of the Interior [give notification date]:

10. The  District Attorney of County  Corporation Counsel of the City New York is a party hereto pursuant to section 254(b) of the Family Court Act.

11. [Required if removal or continued removal of children is requested]:<sup>5</sup> Petitioner is required to obtain education information and to provide that information to foster care providers and other parties to this proceeding. Unless otherwise obtained by release, Petitioner seeks a court order to obtain the education records (including special education and early intervention records) of each child named in this Petition who is not placed with a parent(s)/legal guardian(s), and a court order to provide such records to service providers where such records are necessary to enable the service provider to establish and implement a plan of service.

WHEREFORE, Petitioner requests that an order be made [check applicable box(es)]:

- A. determining the following child(ren)[specify]: to be abused by a preponderance of the evidence; and otherwise dealing with the child(ren) in accordance with

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<sup>5</sup> This notice is required by the federal *Family Educational Rights and Privacy Act* [20 U.S.C. §1232(g)(b)(2)(B)].



In the Matter of

FAMILY FILE #:  
CIN #  
A Child under Eighteen  
Years of Age Alleged to be  
(Abused)(and)(Neglected) by

NOTICE OF PENDING CHILD  
PROTECTIVE PROCEEDING  
(Relatives and Suitable Persons)

Docket No.

Respondent(s)

TO [insert name(s) of Relatives and Suitable Persons]: \_\_\_\_\_

Please take notice that a child protective agency has filed a petition in this court alleging that [insert name(s) of Respondent(s)]: [check applicable box(es)]: neglected abused  severely abused  repeatedly abused the child who is named in the petition.

Please note that you are **not** named as a Respondent in this petition. However, because you may be a possible resource to care for the child named in this petition, you are entitled to notice of the pendency of this petition. You are also entitled to notice of certain rights and information, as follows:

1. You have a right to be heard in proceedings regarding the placement, custody or guardianship of the child. You have a right to appear in the Family Court and to seek to provide care, custody or guardianship for the child. The petition will be heard on [specify date]: at {specify time}: in Family Court, [specify county and address]:

a. You may seek to be approved as a foster parent in order for the child to reside with you temporarily while the petition is pending in court. If a finding is made regarding the Respondent, the child may be placed with the department of social services of [specify county]: New York City Administration for Children’s Services to reside with you for a designated period of time pending periodic reviews in permanency hearings in this Court.

**OR**

b. You may seek to provide free care for the child to reside with you temporarily while the petition is pending in court. If a finding is made regarding the Respondent, the child may be placed directly with you for a designated period of time pending periodic reviews in permanency hearings in this Court.

**OR**

c. You may file a petition under Article 6 of the Family Court Act seeking temporary custody or temporary guardianship of the child while the petition is pending in court. Upon final disposition of this petition, you may seek long-term custody or guardianship of the child.

2. If the Court determines that the child must be removed from home, the Court may order an investigation to determine whether you or someone in your family may be suitable to care for the child.

3. You may contact the following social services official to discuss the options in paragraph 1 [insert name, address and telephone number of social services official]:

4. [Applicable to grandparents]: If you have visitation rights with the child under a prior court order, you may seek to enforce these rights by contacting the above-named social services official or by appearing in Family Court on the date and time indicated on the enclosed summons. You may file a petition to obtain visitation with the child under section 1081(2) of the Family Court Act.

5. If you believe you may be the father of the child, you may file a paternity petition under Article 5 of the Family Court Act.

Dated : Dept. of Social Services, County of:  NYC Admin. for Children’s Services

F.C.A. §§1017, 1033-b, 1040, 1044,  
1046, 1051, 1052, 1053,  
1054, 1055, 1057, 1059, 1089

Form 10-10  
(Child Protective– Order of Fact-finding,  
Disposition and Permanency Hearing)  
6/2016

At a term of the Family Court of the State of New York,  
held in and for the County of \_\_\_\_\_,  
at \_\_\_\_\_, New York, on \_\_\_\_\_.

P R E S E N T:

Hon.  
Judge

.....  
In the Matter of

FAMILY FILE #:  
CIN #

(A) Child (ren) under Eighteen Years  
of Age Alleged to be  
Abused Neglected by

Docket No.

ORDER OF FACT-FINDING AND  
DISPOSITION (AND PERMANENCY HEARING)

.....  
Respondent(s)

Abuse Neglect  
Severe Abuse Repeated Abuse

**NOTICE: WILLFUL FAILURE TO OBEY THE TERMS AND CONDITIONS OF THIS ORDER  
MAY RESULT IN COMMITMENT TO JAIL FOR A TERM NOT TO EXCEED SIX  
MONTHS.**

**IF YOUR CHILD(REN) STAY IN FOSTER CARE FOR 15 OF THE MOST RECENT 22  
MONTHS, THE AGENCY MAY BE REQUIRED BY LAW TO FILE A PETITION TO  
TERMINATE YOUR PARENTAL RIGHTS AND MAY FILE BEFORE THE END OF  
THE 15-MONTH PERIOD. IF SEVERE OR REPEATED ABUSE IS PROVEN BY  
CLEAR AND CONVINCING EVIDENCE, THIS FINDING MAY CONSTITUTE THE  
BASIS TO TERMINATE YOUR PARENTAL RIGHTS. IF THE PETITION IS  
GRANTED, YOU MAY LOSE YOUR RIGHTS TO YOUR CHILD(REN) AND YOUR  
CHILD(REN) MAY BE ADOPTED WITHOUT YOUR CONSENT.**

**THE NEXT COURT DATE IS [specify date/time]:**

**THE NEXT PERMANENCY HEARING SHALL BE HELD ON [SPECIFY DATE/TIME]:<sup>1</sup>**

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<sup>1</sup> If a combined dispositional/permanency hearing was held and the child(ren) have been placed, specify a date certain not more than six months from the completion of the hearing. If solely a dispositional hearing was held, specify a date, in most cases the previously-scheduled date, not more than eight months from date of removal of child(ren) from home. No date needs to be set if: (I) the petition is dismissed; or (ii) the child(ren) have not been removed from home; or (iii) have been finally discharged from care; or (iv) custody or guardianship was ordered pursuant to Family Court Act Article 6. If the child(ren) have been placed and the child(ren) have a sibling or half-sibling removed from the home, whose permanency hearing is scheduled before this Court, the date certain shall be the same as the date certain for the sibling's or half-sibling's permanency hearing, unless the sibling or half-sibling

The petition of [specify]: \_\_\_\_\_ under Article 10 of the Family Court Act, sworn to on [specify date]: \_\_\_\_\_, having been filed in this Court alleging that the above-named Respondent(s) [check applicable box(es)]: neglected abused severely abused repeatedly abused the above-named child; and

Notice having been duly given to the Respondent(s) pursuant to section 1036 or 1037 of the Family Court Act; and [Include separate paragraphs for each Respondent, as necessary]:

Respondent [specify]: \_\_\_\_\_ having:  
appeared with counsel without counsel waived counsel not appeared ;  
not appeared after service not appeared but service could not be made after every reasonable effort had been made to effect service not appeared but counsel appeared;

Respondent [specify]: \_\_\_\_\_ having:  
appeared with counsel without counsel waived counsel not appeared ;  
not appeared after service not appeared but service could not be made after every reasonable effort had been made to effect service not appeared but counsel appeared;

And Respondent [specify]: \_\_\_\_\_ having:  
voluntarily, intelligently and knowingly admitted in open court that (s)he committed the following act(s) [specify]:  
denied the allegations of the petition and the matter having duly come on for a fact-finding hearing before this Court ;  
failed to appear and the matter having duly come on for a fact- finding hearing by inquest before this Court ;  
voluntarily, intelligently and knowingly consented to the entry of an order of fact- finding without admission pursuant to Family Court Act §1051(a), and the Petitioner, Child(ren)'s attorney and all other parties having consented to the entry of such order of fact-finding as well;

And Respondent [specify]: \_\_\_\_\_ having:  
voluntarily, intelligently and knowingly admitted in open court that (s)he committed the following act(s) [specify]:  
denied the allegations of the petition and the matter having duly come on for a fact-finding hearing before this Court ;

failed to appear and the matter having duly come on for a fact- finding hearing by inquest before this Court ;  
voluntarily, intelligently and knowingly consented to the entry of an order of fact-finding without admission pursuant to Family Court Act §1051(a), and the Petitioner, Child(ren)'s attorney and all other parties having consented to the entry of such order of fact-finding as well;

And where the parent(s ) of the above-named child(ren) are not the Respondent(s),

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was removed on a juvenile delinquency or PINS petition or unless he or she has been freed for adoption.

the parent(s) were: present at the hearing and participated as interested party-intervenor(s); served with a notice and copy of the petition but did not appear; were not served with a notice or copy of the petition and did not appear; although every reasonable effort had been made to effect service;

And the child(ren) having been represented by (an) attorney(s);

And the following other interested party-intervenors were present and participated in the hearing [specify name(s) and relationship(s) to child(ren)]:

**[Required in cases involving Native-American children; check if applicable ]:**

And the following having been duly notified [check applicable box(es)]: parent/custodian tribe/nation United States Secretary of the Interior; And the tribe/nation having: appeared and participated as a party; appeared and declined to assume jurisdiction; appeared and requested transfer of jurisdiction; not appeared;

**And the Court, after** [check box] hearing the proof and testimony offered in relation to the case;

OR

accepting the consent of the Respondent, Petitioner and Child(ren)'s attorney to the entry of an order of finding without admission, pursuant to Family Court Act §1051(a);

OR

accepting the admission by Respondent [specify]; and having found [check applicable box(es) and specify act(s) of child abuse and/or neglect found, if any, with respect to each child]:

by a preponderance of the evidence that Respondent [specify]: committed the following acts constituting child neglect child abuse [specify act(s), including name(s) of the child(ren), the Penal Law section, if applicable, and grounds for determination]:

by a preponderance of the evidence that Respondent [specify]: committed the following acts constituting child neglect child abuse [specify act(s), including name(s) of the child(ren), the Penal Law section, if applicable, and grounds for determination]:

**[Applicable only where severe or repeated abuse was alleged and Respondent was so advised]:**

by clear and convincing evidence that Respondent [specify]: severely repeatedly abused the child(ren) by committing the following acts(s) [specify act(s), including the name(s) of the child(ren), the Penal Law section, if applicable; and grounds for determination]:

by clear and convincing evidence that Respondent [specify]: severely repeatedly abused the child(ren) by committing the following acts(s) [specify act(s),

including the name(s) of the child(ren), the Penal Law section, if applicable; and grounds for determination]:

**And the matter having thereafter duly come on for a [check applicable boxes]:**

**DISPOSITIONAL HEARING ;**  **PERMANENCY HEARING** before the Court,

**[Applicable only where hearing was heard jointly with hearing of Family Court Act Article 6 custody or guardianship petition, pursuant to Family Court Act §1055-b; CHECK BOX if applicable]:**

**And the hearing having been heard jointly with the**  **custody**  **guardianship petition, Docket # [specify]:**

**[Applicable only to combined dispositional/permanency hearing; check box(es) if applicable]:**

**And the following person(s) were given notice of the permanency hearing and appeared as indicated below [specify; check applicable boxes]:**

Child(ren)'s Attorney [specify]:	given notice	appeared	did not appear
Prospective adoptive parent(s)[specify]:	given notice	appeared	did not appear
Foster parent(s)[specify]:	given notice	appeared	did not appear
Relative(s)[specify]:	given notice	appeared	did not appear
Non-respondent parent(s)[specify]:	given notice	appeared	did not appear
Other [specify]:	given notice	appeared	did not appear

And the following child(ren) having [check applicable box(es)]:

- Child:  appeared  participated as follows [specify]:  
 did not participate because:  waived  unavailable  other [specify]:
- Child:  appeared  participated as follows [specify]:  
 did not participate because:  waived  unavailable  other [specify]:
- Child:  appeared  participated as follows [specify]:  
 did not participate because:  waived  unavailable  other [specify]:

And notice of the permanency hearing having been sent not less than 14 days in advance of the hearing to the following former foster parents, who provided care for the child(ren) in excess of one year [specify]:

And the Court hearing dispensed with notice to the following former foster parent(s) [specify]:  
as contrary to the to the child(ren)'s best interests;

**And the matter having duly come on to be heard, and the above-named persons appearing having been given notice and an opportunity to be heard, as indicated above, and the Court having considered the position and information provided by the [check applicable box(es)]:**

NYS Office of Children and Family Services local department of social services;

And the child(ren) having been represented by (an) attorney(s) and the Court having had age-appropriate consultation and considered the position of the child(ren) regarding the permanency plan;

[Applicable if child 16 or older has Alternative Planned Permanent Living Arrangement (APPLA) goal; check box if applicable]: And the child having communicated directly with the Court regarding the permanency plan;

**The Court, after having made an examination and inquiry into the facts and circumstances of the case and into the surroundings, conditions, and capacities of the persons involved, finds and determines the following:**

**[Required findings in cases where the child(ren), who had/have NOT been ordered removed earlier in the case, is/are ordered removed; otherwise, skip I and II and go to III]:**

**The Court finds and determines that:**

**I. Required “Best Interests” and “Reasonable Efforts” Findings for Newly-removed Child(ren)**

[check applicable boxes and provide case-specific reasons in both A and B, below]:

A. Continuation of the child(ren) in, or return of the child(ren) to, the child(ren)'s home would  would not be contrary to the best interests of the child(ren) because [specify facts and reasons]:

This determination is based upon the following information [check applicable box(es)]:

- Petition
- Report of Suspected Child Abuse or Neglect
- Case Record, dated [specify]:
- Service Plan, dated [specify]:
- The report of [specify]: , dated [specify]:
- Testimony of [specify]:
- Other [specify]:

B. Reasonable efforts, where appropriate, to prevent or eliminate the need for removal of the child(ren) from the home, and, if the child(ren) was/were removed without court order prior to the date of this hearing, to return them home safely [check applicable box and state reasons as indicated]:

were made as follows [specify]:

were not made but the lack of efforts was appropriate because of a judicial finding that the Petitioner was not required to make reasonable efforts to reunify the child(ren) with the Respondent(s) [specify date of finding]:

were not made.

This determination is based upon the following information [check applicable box(es)]:

- Petition
- Report of Suspected Child Abuse or Neglect
- Case Record, dated [specify]:
- Service Plan, dated [specify]:
- The report of [specify]: , dated [specify]:

Testimony of [specify]:

Other [specify]:

**II. Findings Regarding Alternatives to Placement in Foster Care:**

**A. Based upon the investigation conducted by the Commissioner of Social Services, including a review of records in accordance with section 1017 of the Family Court Act,**

[Check applicable box(es):

The following person [specify]: \_\_\_\_\_ is a \_\_\_\_\_ non-respondent parent legal custodian<sup>2</sup> or guardian relative suitable person with whom the child(ren) may appropriately reside.

**[Applicable to non-respondent parent]:** Such non-respondent parent: \_\_\_\_\_ wishes the child(ren) to be released to him/her during the pendency of an order pursuant to section 1054 of the Family Court Act. \_\_\_\_\_ wishes to be granted an order of custody, pursuant to a proceeding under Article 6 of the Family Court Act and has filed a petition, Docket # \_\_\_\_\_, which [check applicable box]: \_\_\_\_\_ is being heard jointly with this proceeding; \_\_\_\_\_ is scheduled to be heard on [specify date]: \_\_\_\_\_

**[Applicable to legal custodian or guardian]:** Such legal custodian or guardian: \_\_\_\_\_ wishes the child(ren) to be released to him/her during the pendency of an order pursuant to section 1054 of the Family Court Act.

**[Applicable to relatives and other suitable persons]:** Such person: \_\_\_\_\_ seeks approval as a foster parent in order to provide care for the child(ren); \_\_\_\_\_ wishes to provide care and custody for the child(ren) without foster care subsidy during the pendency of an order pursuant to section 1055 of the Family Court Act. \_\_\_\_\_ wishes to be granted an order of custody, pursuant to a proceeding under Article 6 of the Family Court Act and has filed a petition, Docket # \_\_\_\_\_, which [check applicable box]: \_\_\_\_\_ is being heard jointly with this proceeding; \_\_\_\_\_ is scheduled to be heard on [specify date]: \_\_\_\_\_

\_\_\_\_\_ wishes to be appointed guardian pursuant to a proceeding under Article 6 of the Family Court Act and has filed a petition, Docket # \_\_\_\_\_, which [check applicable box]: \_\_\_\_\_ is being heard jointly with this proceeding; \_\_\_\_\_ is scheduled to be heard on [specify date]: \_\_\_\_\_.

There is no non-respondent parent, legal custodian or guardian or relative or suitable person with whom the child(ren) may appropriately reside.

**B. [Required]: Imminent risk to the child(ren)** \_\_\_\_\_ would \_\_\_\_\_ would not be eliminated by the issuance of a temporary order of protection or order of protection directing the removal of [specify]: \_\_\_\_\_

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<sup>2</sup>“Legal custodian” refers to an individual with an order of custody issued prior to, and separate from, the child protective proceeding. A release to such an individual is distinguished from a child placed in the custody of an individual pursuant to an order of custody issued under Article 6 and section 1055-b of the Family Court Act. Such a custody order results in the termination of all orders and continuing jurisdiction under Article 10 of the Family Court Act and would not be deemed a “release” of the child.

from the child(ren)'s residence.

**III. Required Findings Regarding Efforts to Further Permanency Plan [Required if hearing was combined dispositional/permanency hearing; if not, skip to IV]:**

**A. Reasonable Efforts to Return the Child(ren) Home [Required where permanency plan is reunification]:**

Where the child(ren) were removed from the home, reasonable efforts, where appropriate, to return the child(ren) home safely [check applicable box and state reasons as indicated]:  
were made as follows [specify]:

were not made but the lack of efforts was appropriate because of a judicial finding that the authorized agency was not required to make reasonable efforts to reunify the child(ren) with the parent(s) [specify date of finding]:

were not made.

This determination is based upon the following information [check applicable box(es)]:

- Permanency Report, sworn to on [specify date]:
- Case Record, dated [specify]:
- Service Plan, dated [specify]:
- Probation Department report, dated [specify]:
- Mental health evaluation, dated [specify]:
- The report of [specify]: , dated [specify]:
- Testimony of [specify]:
- Other [specify]:

**B. Reasonable Efforts to Further Plan Other than Reunification [Required in cases in which the child(ren)'s permanency plan is adoption, guardianship or permanent living arrangement other than reunification with the parent(s) or other person(s) legally responsible for the child(ren)'s care]:** Reasonable efforts to make and finalize the permanency planning goal of [specify]:

were made as follows [specify reasonable efforts, including consideration of out-of-State resources; indicate specific documents or evidence supporting findings]:

were not made.

This determination is based upon the following information [check applicable box(es)]:

- Permanency Report, sworn to on [specify date]:
- Case Record, dated [specify]:
- Service Plan, dated [specify]:
- Probation Department report, dated [specify]:
- Mental health evaluation, dated [specify]:
- The report of [specify]: , dated [specify]:
- Testimony of [specify]:
- Other [specify]:

**IV. Required Findings regarding all releases of child(ren) to Respondent(s), Non-respondent parents or legal custodians or guardians and orders of direct placement with relative(s) or suitable person(s); check applicable box(es)]**

And the Court having searched the statewide registry of orders of protection, the sex offender registry and the Family Court’s warrant and child protective records, and having notified the attorneys for the parties and for the child [check if applicable]: “ and the following self-represented party or parties [specify]: of the results of these searches;

And the Court having considered and relied upon the following results of these searches in making this decision [specify; if no results found, so indicate]:

**V. Required Findings Regarding Transitional Services and Out-of-State Placements:**

**[Required regarding child(ren) who will reach 14 years of age before the next permanency hearing]:** The services, if any, needed to assist the child(ren) in learning independent living skills to make the transition from foster care to successful adulthood are [specify]:

**OR**

The Court finds that NO services or assistance are needed to assist the child(ren) to assist the child(ren) in learning independent living skills to make the transition from foster care to successful adulthood.

**[Required regarding child(ren) placed outside New York State]:** Placement outside New York State is is not appropriate, necessary and in the child(ren)’s best interests;

**NOW therefore, upon findings made in the [check applicable box(es)]: fact-finding, dispositional, and permanency hearing(s); and upon all proceedings had herein, it is hereby**

**A. Order of Fact-finding or Dismissal:**

ADJUDGED that facts sufficient to sustain the petition herein have have not been established, in that [specify]:

; and it is hereby

**[Check all applicable box(es); if different findings were made for each child(ren), list each child and finding separately]:**

ADJUDGED that the above-named child(ren) (is) (are)  
 neglected  abused  severely abused  repeatedly abused,  
as defined in section 1012 of the Family Court Act by [specify Respondent(s)]:

**OR**

ORDERED, that the petition filed herein be DISMISSED.

**B. Order of Disposition [Applicable where one or more children have been adjudicated neglected, abused, severely abused or repeatedly abused; check all applicable box(es)]:**

And the Court, having considered the best interests and safety of the child(ren), including whether the child(ren) would be at risk of abuse or neglect if returned to the parent(s) or other person(s) legally responsible, hereby orders the following:

**ORDERED that judgment against the Respondent(s) is hereby suspended for a period of [specify]: months upon the following terms and conditions:**<sup>3</sup>

**ORDERED that the child(ren) (is) (are) released to the Respondent(s) [specify]: pursuant to section 1057 of the Family Court Act.**

**ORDERED** that the release shall be for following period of time [specify period up to one year from the date of this order]:<sup>4</sup>

**ORDERED** that during the period of release, the following respondent parent(s)[specify]: shall shall not be under the supervision of a child protective agency, social services official, or duly authorized agency pursuant to section 1057 of the Family Court Act; upon the following terms and conditions to be met by Respondent(s) [specify]:

upon the terms and conditions specified in the annexed Family Treatment Court agreement, dated [specify]:

upon the performance of the following supervisory actions by the child protective agency, social services official or duly authorized agency [specify]:

upon the provision by the child protective agency, social services official or duly authorized agency of the following services or assistance to the child(ren) and their family, pursuant to section 1015-a of the Family Court Act [specify]:<sup>5</sup>

**OR**

**ORDERED that the child(ren) (is) (are) released to the following non-respondent parent or legal custodian or guardian [specify]: pursuant to section 1054 of the Family Court Act.**

**ORDERED** that the release shall be for following period of time [specify period up to one year from the date of this order]:<sup>6</sup>

**ORDERED** that, during the period of release, the non-respondent parent or legal

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<sup>3</sup> An order of suspended judgment may NOT be combined with an order of placement or an order releasing child(ren) to a parent under supervision.

<sup>4</sup> The total period of release may not exceed one year plus an extension of up to one year for good cause.

<sup>5</sup> Services and assistance ordered under F.C.A. §1015-a must be authorized under the comprehensive annual services program plan in effect.

<sup>6</sup> The period of release may not exceed one year plus an extension for good cause so that the total period of the release and extension thereof may not exceed two years.

custodian or guardian, who have submitted to the jurisdiction of the Court with respect to the child(ren), shall cooperate with respect to making the child(ren) available for court-ordered visitation with respondents, siblings and others, appointments with the child(ren)'s attorneys and clinicians and other individuals or programs providing services to the children, visits (including home visits) by the child protective agency and the following additional direction(s) [specify]:

**ORDERED** that during the period of release, the following respondent parent(s)[specify]:

shall shall not be under the supervision of a child protective agency, social services official, or duly authorized agency pursuant to section 1057 of the Family Court Act:

upon the following terms and conditions to be met by Respondent(s) [specify]:

upon the terms and conditions specified in the annexed Family Treatment Court agreement, dated [specify]:

upon the performance of the following supervisory actions by the child protective agency, social services official or duly authorized agency [specify]:

upon the provision by the child protective agency, social services official or duly authorized agency of the following services or assistance to the child(ren) and their family, pursuant to section 1015-a of the Family Court Act [specify]:<sup>7</sup>

**OR**

**ORDERED that, pursuant to Family Court Act §1055, the child(ren) (is) (are) placed directly with [specify relative or other suitable person]:** until the completion of the next permanency hearing, scheduled for the date certain indicated in this order, subject to the further orders of this Court, for the following reasons [specify]:

**ORDERED** that, during the pendency of the placement, the relative or suitable person, who has submitted to the jurisdiction of this Court with respect to the child(ren), shall cooperate with respect to making the child(ren) available for court-ordered visitation with respondents, siblings and others, appointments with the child(ren)'s attorneys and clinicians and other individuals or programs providing services to the children, visits (including home visits) by the child protective agency and the following additional direction(s) [specify]:

**ORDERED** that during the period of such placement, Respondent(s)[specify]: are to remain under the supervision of a child protective agency, social services

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<sup>7</sup> Services and assistance ordered under F.C.A. §1015-a must be authorized under the comprehensive annual services program plan in effect.

official, or duly authorized agency:

upon the following terms and conditions to be met by Respondent(s) [specify]:

upon the terms and conditions specified in the annexed Family Treatment Court agreement, dated [specify]:

upon the performance of the following supervisory actions by the child protective agency, social services official or duly authorized agency [specify]:

**ORDERED** that the child protective agency, social services official or duly authorized agency shall provide the following services or assistance to the child(ren) and their family, pursuant to section 1015-a of the Family Court Act [specify]:<sup>8</sup>

**OR**

**ORDERED that the child(ren) (is) (are) placed in the custody of the Commissioner of Social Services of [specify]: County,**

[Check box(es), if applicable]:

to reside with [specify authorized agency or facility, if any]:

to reside in foster care with [specify relative or other suitable person]:<sup>9</sup>

until the completion of the next permanency hearing, scheduled for the date certain indicated in this order, subject to the further orders of this Court, for the following reasons [specify]:

**ORDERED** that during the period of such placement, Respondent(s)[specify]: are to remain under the supervision of a child protective agency, social services official, or duly authorized agency:

upon the following terms and conditions to be met by Respondent(s) [specify]:

upon the terms and conditions specified in the annexed Family Treatment Court agreement, dated [specify]:

upon the performance of the following supervisory actions by the child protective agency, social services official or duly authorized agency [specify]:

**ORDERED** that the child protective agency, social services official or duly authorized agency shall provide the following services or assistance to the child(ren) and their family,

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<sup>8</sup> Services and assistance ordered under F.C.A. §1015-a must be authorized under the comprehensive annual services program plan in effect.

<sup>9</sup> The relative or suitable person must be approved or certified as a foster parent.

pursuant to section 1015-a of the Family Court Act [specify]:<sup>10</sup>

**ORDERED** that the Commissioner of Social Services is authorized to discharge the child(ren) from the Commissioner’s care to the parent without further court hearing, provided that written notice is provided to the Court and child(ren)’s attorney not less than 10 days in advance of the discharge.

**AND IT IS FURTHER ORDERED** that [specify Respondent(s) or other person(s) before the court]: is required to comply with the terms and conditions specified in the order of protection, issued pursuant to Family Court Act §1056, annexed to this order and made a part thereof.

**Releases and Direct Placements: [Applicable to all releases of child(ren) to Respondent(s), Non-respondent parents or legal custodians or guardians and placements of child(ren) directly with relative(s) or suitable person(s); check applicable box(es)]:**

**IT IS FURTHER ORDERED** that, during the period of release or direct placement, as applicable the individual to whom the child(ren) have been released or with whom the child(ren) have been placed under this Order may [check applicable box(es)]:

- enroll the child(ren) in public school in the applicable school district and, upon verifying the Order and that the individual resides within the district, such district shall enroll the child(ren);
- enroll the child(ren) in their employer-based health insurance plan with the same rights as child(ren) for whom the individual is the legal guardian or custodian; and
- make decisions and provide any necessary consents regarding the child(ren)’s:
  - protection
  - education
  - care and control
  - physical custody
  - health and medical needs, provided that this Order does not limit any rights of the child(ren) to consent to medical care under applicable laws.

**Trial Discharges: Restrictions and Extensions [Applicable to child(ren) placed with the Commissioner of Social Services]:**

[Check box if applicable]:<sup>11</sup> **ORDERED** that the Commissioner of Social Services may discharge the child(ren) on a trial basis or continue such a discharge until the earlier of the completion of the next Permanency Hearing or further Order of the Court may not discharge the child(ren) on a trial basis to the physical custody of Respondent [specify]:  
 may only discharge the child(ren) on a trial basis to the physical custody of Respondent [specify]: , upon the following event(s) or condition(s)  
 [specify]:

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<sup>10</sup> Services and assistance ordered under F.C.A. §1015-a must be authorized under the comprehensive annual services program plan in effect.

<sup>11</sup> If neither box is checked, the Commissioner is authorized to discharge the child(ren) on a trial basis to the Respondent(s), with the legal care and custody remaining with the Commissioner. Permanency hearings must be scheduled and held in all trial discharge cases. If the child(ren) is/are 18 years of age or older, the child(ren) must consent to any trial discharge.

**[Applicable to child(ren) aging out of foster care; check box if applicable]:<sup>12</sup>**

**ORDERED** that the Commissioner of Social Services

may not discharge the child(ren) on a trial basis to another planned permanent living arrangement;

may only discharge the child(ren) on a trial basis to the following planned permanent living arrangement [specify, including significant connections to an adult willing to be a permanent resource]:

upon the following event(s) or condition(s) [specify]:

**[Applicable to children 18 and over who will be discharged on a trial basis with their consent]:**

The Commissioner of Social Services:

shall discharge the child(ren) on a trial basis

shall continue or extend the trial discharge of the child(ren)

may continue or extend the trial discharge of the child(ren)

to another planned permanent living arrangement other [specify]:

until the earlier of the next permanency hearing, further Order of the Court OR the child(ren)'s 21<sup>st</sup> birthday(s).

Youth 18 and over discharged on a trial basis shall inform the local department of social services of any change in mailing address and contact information.

**[Applicable to all placements pursuant to Family Court Act §1055]:**

**ORDERED** that if the children abscond from the above-named custodial person or facility, written notice shall be given within 48 hours to the Clerk of Court by the custodial person or by an authorized representative of the facility, stating the name of the child(ren), the docket number of this proceeding, and the date on which the child(ren) ran away.

**ORDERED** that [specify]: \_\_\_\_\_, a social services official a duly authorized agency, undertake diligent efforts to encourage and strengthen the parental relationship, including encouraging and facilitating visiting with the child(ren) by the parent or other person legally responsible, and encourage and facilitate visiting with the child(ren) by any non-custodial parent or grandparent who has obtained an order pursuant to F.C.A. §1081 and by the child(ren)'s siblings. Such efforts shall include, but are not limited to, the following [specify]:

**ORDERED** that the Commissioner of Social Services authorized agency [specify]: \_\_\_\_\_ is directed to file termination of parental rights petitions regarding the following child(ren)[specify]: \_\_\_\_\_ against the following respondent(s) [specify]: \_\_\_\_\_ within 90 days of the entry of this order.

**ORDERED** that the Commissioner of Social Services shall investigate whether there are any

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<sup>12</sup> If neither box is checked, the Commissioner is authorized to discharge child(ren), who are 16 years of age or older, on a trial basis to another planned permanent living arrangement, with the legal care and custody remaining with the Commissioner. Permanency hearings must be scheduled and held in all trial discharge cases. If the child(ren) is/are 18 years of age or older, the child(ren) must consent to any trial discharge.

non-respondent parent(s), grandparent(s), other relative(s) or other suitable person(s) with whom the child(ren) may appropriately reside, including, but not limited to [specify]:  
 ; shall inform them of the pendency of the proceeding; shall ascertain whether such non-respondent parent(s) wish to seek release or custody of the child(ren) or whether such grandparent(s), relative(s) or other suitable person(s) wish to seek approval as foster parent(s) in order to provide care for the child(ren) or wish to provide care and custody for the child(ren) without foster care subsidy during the pendency of any order herein; and shall report the results of such investigation to the court and parties, including the attorney for child and shall record the results of such investigation in the child(ren)'s Uniform Case Record;

**ORDERED** within 24 hours of this order, the Commissioner of Social Services shall commence an investigation to identify and locate any non-respondent parent(s), inform them of the pendency of the proceeding and of the opportunity for seeking release or custody of the child(ren) , record the results of such investigation in the child's Uniform Case Record and report the results of the investigation to the Court, all parties and counsels, including the child(ren)'s attorney, forthwith. Such search shall also include, but not be limited to, a person not recognized as a legal parent of the child(ren) but who has filed an instrument pursuant to section 4-1.2 of the Estates, Powers and Trusts Law acknowledging paternity with the putative father registry, has a pending paternity petition or has been identified as a parent by the other parent in a written, sworn statement. Such search shall include, but not be limited to, the following person(s) [specify, if known]:

**ORDERED** within 24 hours of this order, the Commissioner of Social Services shall commence an investigation of the following relatives or other suitable persons as foster parents and thereafter approve such person(s) to be foster parents, if qualified, and, if not, to report such fact to the Court, all parties and counsels, including the child(ren)'s attorney, forthwith [specify]:

**ORDERED** that the child(ren) is/are directed to be placed together with the following siblings or half-siblings [specify]:

**ORDERED** that the Commissioner of Social Services is directed to investigate the appropriateness of placing the child(ren) with the following siblings or half-siblings [specify]:

**[Applicable where dispositional hearing is heard jointly with custody or guardianship hearing under Article 6 of the Family Court Act in accordance with Family Court Act §1055-b]:**

**Custody with Non-respondent parent(s):**

The Court having adjudged that custody of the following child(ren)[specify]:  
 with the following non-respondent parent [specify]: is in the best interests of the child(ren) in accordance with Article 6 of the Family Court Act and Domestic Relations Law §240, **IT IS, THEREFORE, ORDERED** that such non-respondent parent is granted custody of : pursuant to an Order of custody granted on Docket # , dated:  
 , thereby terminating the jurisdiction of this Court over this Article 10 proceeding and terminating placement with the local Commissioner of Social Services.

**OR**

**Custody with Respondent(s), relative(s) or suitable persons; guardianship with relative(s) or**

**suitable person(s):**

The Court having adjudged that [Note: Findings are REQUIRED under (I) and (ii), below]:

(i) [Check one of the following boxes]:

all parties, including the attorney of the child(ren) and any foster parent who has had custody of the child(ren) in excess of one year, have consented to such custody or guardianship;

**OR**

the following parent(s)[specify]: \_\_\_\_\_ have not consented but this Court has found extraordinary circumstances supporting custody or guardianship;

**AND**

(ii) custody of the following child(ren)[specify]: \_\_\_\_\_ with [specify respondent parent(s)]: \_\_\_\_\_ will provide a safe and permanent home for the child(ren) and the safety of the child(ren) will not be jeopardized if the respondent(s) are no longer under the jurisdiction of this Court on this petition and are not receiving services or supervision;

**OR**

custody guardianship of the following child(ren)[specify]: \_\_\_\_\_ with by [specify relative(s) or suitable person(s)]: \_\_\_\_\_ will provide a safe and permanent home for the child(ren) and the safety of the child(ren) will not be jeopardized if the respondent(s) are no longer under the jurisdiction of this Court on this petition and are not receiving services or supervision;

**AND**

**IT IS, THEREFORE ORDERED** that [specify Respondent, relative(s) or suitable person(s)]: \_\_\_\_\_ is/are granted custody of [specify child(ren)]: \_\_\_\_\_ pursuant to an Order granted on Docket # [specify]: \_\_\_\_\_, dated [specify]: \_\_\_\_\_ thereby terminating the jurisdiction of this Court over this proceeding;

**OR**

**IT IS, THEREFORE ORDERED** that [specify relative(s) or suitable person(s)]: \_\_\_\_\_ is/are appointed guardian(s) of [specify child(ren)]: \_\_\_\_\_ pursuant to an Order granted on Docket # [specify]: \_\_\_\_\_, dated [specify]: \_\_\_\_\_ thereby terminating the jurisdiction of this Court over this proceeding;

**AND IT IS FURTHER ORDERED** that the following local department of social services [specify]: \_\_\_\_\_ and the following attorney for the child(ren)[specify]: \_\_\_\_\_ shall be notified and shall be made parties to any subsequent proceedings for modification, enforcement or termination of the Order granted on such Docket #;

**[Applicable in abandonment cases involving children under one year of age]:**

And the Court having adjudged that the following child(ren)( is)(are) under the age of one year [specify]: \_\_\_\_\_; and (has) (have) been abandoned by the parent(s) person(s) legally responsible for the care of the child(ren) for a period of [specify]: \_\_\_\_\_; and that such parent(s) or person(s) legally responsible for the care of the child(ren) did not appear after due notice, it is, therefore,

**ORDERED** that the Commissioner of Social Services of [specify]: \_\_\_\_\_ County, shall

[check applicable box(es)]:

promptly commence a diligent search to locate the child(ren)'s parents or other known relatives legally responsible for the child(ren);  
 commence a proceeding to commit custody and guardianship of the child(ren) to an authorized agency pursuant to Section 384-b of the Social Services Law six months from the date care and custody was transferred to the Commissioner, unless there has been communication and visitation between such child(ren) and (his)(her)(their) parents.  
 provide written notice, as required by Family Court Act §1055 (b)(vii)(B), to the child(ren)'s parents in the manner required for service of process pursuant to section 617 of such Act; and it is further

**[REQUIRED for all dispositions other than placement pursuant to Family Court Act §1055]**

**ORDERED** that, not later than 60 days prior to the expiration of this order, the Petitioner shall report to the Court, the attorney for the child(ren), the parties, their attorneys and the non-respondent parent(s), unless in the case of a release of the child(ren) a petition for extension of the period of supervision of Respondent and/or release of the child has been filed;<sup>13</sup> on the status and circumstances of the child(ren) and family and any actions contemplated, if any, by the agency with respect to the child(ren) and family; and it is further

**[Applicable to dispositions of release and/or supervision]:** **ORDERED** that, during the period of supervision and/or release, Petitioner shall submit progress reports to the Court, the parties and the attorney for the child as follows [specify]:

**Additional Requirements in Placement Cases:**

**[Applicable in all cases where child(ren) is/are placed with Commissioner of Social Services]:**

**1. Transitional Services [Applicable to children who will attain the age of 14 years of age or older prior to the next permanency hearing]:**

**ORDERED** that the Petitioner shall provide the following services and assistance to assist the child(ren) in learning independent living skills to make the transition from foster care to successful adulthood [specify]:

And it is further **ORDERED that** the permanency plan developed for the child(ren) in foster care and any revision or addition to the plan, shall be developed in consultation with the child(ren). The child(ren) may select up to two members of the child(ren)'s permanency planning team to participate, one of whom may be designated to be the child(ren)'s advisor and, as necessary, advocate, with respect to the application of the reasonable and prudent parent standard to the child(ren); provided, however, that such members may not be foster parents of, or case workers, case planners or case managers for, the child(ren) and that the local commissioner of social services with custody of the child(ren) may reject an individual so selected by the child(ren) if such local commissioner has good cause to believe that the individual would not act in the best interests of the child(ren);

**2. Out-of-State Placement [Required for children placed out-of-state]:**

**ORDERED** that the placement of the child(ren) at [specify]: \_\_\_\_\_, is appropriate, necessary and in the child(ren)'s best interests and is continued until completion of the next permanency hearing scheduled for a date certain in this order;

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<sup>13</sup> Unless the Court determines that facts and circumstances do not warrant a report, a report 60 days prior to the expiration of the order is required where the extension is issued on consent of the parties and the attorney for the child and may be ordered in the Court's discretion in other cases. See Family Court Act §§1054(d); 1057(c).

is not appropriate, necessary and in the child(ren)'s best interests and the child(ren) shall, therefore, be returned to New York State to be placed with [specify]:  
 discharged to [specify]: ; (and it is further)

**3. Progress Reports and Notices:**

**ORDERED** that Petitioner shall make a progress report to the Court, the parties and the child(ren)'s attorney on the implementation of this order as follows [specify date and/or frequency]:  
 ; (and it is further)

**ORDERED** that if the above permanency plan for the above-named child(ren) is changed, notice shall be provided to the Court, the parties and the child(ren)'s attorney forthwith, (and it is further)

**4. Duty to Disclose Changes in Mailing Address [Required]**

**ORDERED** that the Respondent parent(s) or other person(s) legally responsible for the children's care are required to notify the local social services district or agency of any change of mailing address ; (and it is further).

**5. Planning Conferences [Required]**

**ORDERED** that the parent(s) other person(s) legally responsible for the children(s) care shall be notified of the planning conference(s) to be held and of (his)(her)right to attend such conference(s) with counsel or other person; (and it is further)

**6. Visiting Plans [Required]s**

**ORDERED** that Petitioner shall provide the parent other person(s) legally responsible for the child(ren)'s care with visits with the child as follows [describe visiting plan]:

and the parent(s) guardian(s) shall visit in accordance with the plan; (and it is further)

**ORDERED** that Petitioner shall provide the following sibling(s) [specify]:  
 with visits with the child(ren) as follows [describe visiting plan]:  
 ; (and it is further)

**7. Respondent Parents Who Are or Were Incarcerated or in Residential Substance Abuse Treatment** [check box(es) if applicable]:

The Commissioner of Social Services or authorized agency is directed to take the following steps [specify]:

to complete an assessment of whether the following respondent(s)[specify]:  
 maintain a meaningful role in the child(ren)'s life, based upon the criteria in Social Services Law §384-b(3)(1(v), to determine whether there is a compelling reason that the filing of a petition to terminate parental rights would not be in the child(ren)'s best interest.

**8. Native-American Child(ren)** [check box(es) if applicable]:

**ORDERED** that the following should be notified of this proceeding [specify]:  
 the custodian of the child(ren); tribe/nation; United States Secretary of the Interior  
**ORDERED** that in light of the assumption of jurisdiction by the tribe/nation, this petition is DISMISSED WITHOUT PREJUDICE; (and it is further)

**C. Permanency Hearing Order: [Required where combined dispositional/permanency hearing has been held; not required if hearing was solely a dispositional hearing]:**

1. **ORDERED** that the permanency plan is:
  - reunification with the parent(s) other person(s) legally responsible for the child(ren)'s care by [specify date]:
  - placement for adoption, including consideration of interstate options::
    - upon filing a petition to terminate parental rights within 90 days;
    - termination of parental rights petition already filed.
  - referral for legal guardianship by [specify name and date]:
  - permanent placement with the following fit and willing relative [specify]:
    - by [specify date]:
  - [Applicable ONLY to child(ren) 16 years of age or older]:** permanent placement in the following alternative planned living arrangement [specify]:

**Required for permanency hearing involving a child(ren) 16 years of age or older with Alternative Planned Permanent Living Arrangement (APPLA) Goals [check applicable box(es) in ¶¶a - f ]:**

a. Evidence has been provided to the Court, indicating compelling reason(s) that it would not be in the child(ren)'s best interests to return home, be referred for termination of parental rights and adoption, placed with a fit and willing relative, or placed with a legal guardian. These reasons are as follows [specify compelling reason(s)]:

b. Evidence has been provided to the Court, indicating that intensive, ongoing, and, as of the date of this Order, unsuccessful efforts were made to return the child(ren) home or secure a placement for the child(ren) with a fit and willing relative, including adult siblings, a legal guardian, or an adoptive parent, including through efforts that utilize search technology including social media to find biological family members of the child(ren).

c. Evidence has not been provided to the Court that a "reasonable and prudent parent" standard of care has been applied to the child(ren) in the facility or home in which he or she resides;

d. Evidence has not been provided to the Court that the child(ren) has/have been provided with regular, ongoing opportunities to engage in age or developmentally appropriate activities and has been consulted in an age-appropriate manner about the opportunities to participate in such activities;

e. The Court inquired directly of the child(ren) regarding the permanency plan.

f. The following individual, with whom the child(ren) has/have a significant connection, is willing and is designated to be the child(ren)'s permanency resource [specify]:

g. The Court has determined that APPLA with a significant connection to an adult willing to be a permanency resource for the child(ren) is the best permanency plan for the child(ren) because [specify]:

**[Applicable in all cases]: AND IT IS FURTHER ORDERED** that any modifications of the Permanency Goal shall be given by Petitioner to the parent(s) or other person(s) legally responsible for the child(ren)'s ; (and it is further)

2. **ORDERED** that Petitioner’s permanency plan for the above-named child(ren) is [check applicable box and indicate anticipated date for achievement]: approved without modification; anticipated date for achievement:[specify]: modified, as follows [specify, including anticipated date for achievement]: ; (and it is further)

3. **ORDERED** that the educational vocational components of the child(ren’s) permanency plan are appropriate should be modified as follows [specify]:

**ORDERED** that Petitioner shall take the following steps and/or provide the following services for the education, health and well-being of the child(ren) [specify]: ; (and it is further)

4. **ORDERED** that any modifications of the Permanency Hearing report shall be given by Petitioner to the parent(s) other person(s) legally responsible for the child(ren)’s care, along with a copy of this Order; (and it is further)

**D. Date Certain for Next Permanency Hearing [Required in all cases in which placement is ordered with the Commissioner of Social Services or with a relative or other suitable person]:**

**ORDERED that if the child(ren) remain(s) in foster care or in placement with a relative or other suitable person, the next permanency hearing shall be held on [specify date certain]:<sup>14</sup>**

**Petitioner shall transmit notice of the hearing and a permanency report no later than 14 days in advance of the above date certain to the Respondent and non-respondent parents, other parties, attorneys, the child(ren)’s attorney and any pre-adoptive parents or relatives providing care to the child(ren), and shall also transmit notice of the hearing to former foster parent(s) who have had care of the child(ren) in excess of 12 months , except [specify former foster parents for whom such notice would be contrary to child(ren)’s best interests, if any]:**

; (and it is further)

ORDERED

ENTER

\_\_\_\_\_  
Judge of the Family Court

Dated: \_\_\_\_\_

PURSUANT TO SECTION 1113 OF THE FAMILY COURT ACT, AN APPEAL FROM THIS ORDER MUST BE TAKEN WITHIN 30 DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT,

<sup>14</sup> If a combined dispositional/permanency hearing was held and the child(ren) has/have been placed, specify a date certain not more than six months from the completion of the hearing. If solely a dispositional hearing was held, specify a date, in most cases the previously-scheduled date, not more than eight months from date of removal of child from home. No date needs to be set if : (I) the petition is dismissed; or (ii) the child(ren) has/have not been removed from home; or (iii) has been finally discharged from care; or (iv) custody or guardianship was ordered pursuant to Family Court Act Article 6. If the child(ren) has/have been placed and the child(ren) has/have a sibling or half-sibling removed from the home, whose permanency hearing is scheduled before this Court, the date certain shall be the same as the date certain for the sibling’s or half-sibling’s permanency hearing, unless the sibling or half-sibling was removed on a juvenile delinquency or PINS petition or unless he or she has been freed for adoption.

35 DAYS FROM THE DATE OF MAILING OF THE ORDER TO APPELLANT BY THE CLERK OF COURT, OR 30 DAYS AFTER SERVICE BY A PARTY OR THE ATTORNEY FOR THE CHILD UPON THE APPELLANT, WHICHEVER IS EARLIEST

Check applicable box:

- Order mailed on [specify date(s) and to whom mailed ]: \_\_\_\_\_
- Order received in court on [specify date(s) and to whom given]: \_\_\_\_\_

DRL §77-d

Form UCCJEA-19  
(Certification of Registration of  
Order of Custody or Visitation–  
UCCJEA)

8/2002

.....  
In the Matter of a Proceeding for Registration of  
Out-of-State Order of Custody or Visitation  
Under the *Uniform Child Custody Jurisdiction  
and Enforcement Act*

Petitioner,

Docket No.  
CERTIFICATION OF  
REGISTRATION OF  
OUT-OF-STATE ORDER OF  
CUSTODY OR  
VISITATION – UCCJEA

-against-

Respondent.

.....  
TO [specify name and address]:

I, \_\_\_\_\_ Clerk of the Family Court of the State of New York,  
County of [specify]: \_\_\_\_\_, do hereby certify that the order of  
custody or visitation, dated [specify]: \_\_\_\_\_, issued by the following  
court in the following jurisdiction [specify]: \_\_\_\_\_

has been registered in the State of New York, pursuant to Section 77-d of the New York State  
Domestic Relations Law, and is deemed to have the same force and effect and is enforceable  
as if it were issued by a Court of the State of New York.

This order concerns the following child(ren):

Name(s)

Date(s) of Birth

In testimony whereof, I have affixed the seal of this Court this day of {specify}:

\_\_\_\_\_  
Clerk of the Family Court



**417 U.S. 535**  
**94 S.Ct. 2474**  
**41 L.Ed.2d 290**

**Rogers C. B. MORTON, Secretary of the  
Interior, et al., Appellants,**

**v.**

**C. R. MANCARI et al. AMERIND,  
Appellant, v. C. R. MANCARI et al.**

**Nos. 73—362, 73—364.**

Argued April 24, 1974.

Decided June 17, 1974.

Syllabus

Appellees, non-Indian employees of the Bureau of Indian Affairs (BIA), brought this class action claiming that the employment preference for qualified Indians in the BIA provided by the Indian Reorganization Act of 1934 contravened the anti-discrimination provisions of the Equal Employment Opportunities Act of 1972, and deprived them of property rights without due process of law in violation of the Fifth Amendment. A three-judge District Court held that the Indian preference was implicitly repealed by § 11 of the 1972 Act proscribing racial discrimination in most federal employment, and enjoined appellant federal officials from implementing any Indian employment preference policy in the BIA. Held:

1. Congress did not intend to repeal the Indian preference, and the District Court erred in holding that it was repealed by the 1972 Act. Pp. 545—551.

(a) Since in extending general anti-discrimination machinery to federal employment in 1972, Congress in no way modified and thus reaffirmed the preferences accorded Indians by §§ 701(b) and 703(i) of Title VII of the Civil Rights Act of 1964 for employment by Indian tribes or by private industries located on or near Indian reservations, it would be anomalous to

conclude that Congress intended to eliminate the longstanding Indian preferences in BIA employment, as being racially discriminatory. Pp. 547—548.

(b) In view of the fact that shortly after it passed the 1972 Act Congress enacted new Indian preference laws as part of the Education Amendments of 1972, giving Indians preference in Government programs for training teachers of Indian children, it is improbable that the same Congress condemned the BIA preference as racially discriminatory. Pp. 548—548.

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(c) The 1972 extension of the Civil Rights Act to Government employment being largely just a codification of prior anti-discrimination Executive Orders, with respect to which Indian preferences had long been treated as exceptions, there is no reason to presume that Congress affirmatively intended to erase such preferences. P. 549.

(d) This is a prototypical case where an adjudication of repeal by implication is not appropriate, since the Indian preference is a longstanding, important component of the Government's Indian program, whereas the 1972 anti-discrimination provisions, being aimed at alleviating minority discrimination in employment, are designed to deal with an entirely different problem. The two statutes, thus not being irreconcilable, are capable of co-existence, since the Indian preference, as a specific statute applying to a specific situation, is not controlled or nullified by the general provisions of the 1972 Act. Pp. 549—551.

2. The Indian preference does not constitute invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment but is reasonable and rationally designed to further Indian self-government. Pp. 551—555.

(a) If Indian preference laws, which were derived from historical relationships and are explicitly designed to help only Indians, were deemed invidious racial discrimination, 25 U.S.C. in its entirety would be effectively erased and the Government's commitment to Indians would be jeopardized. Pp. 553—554.

(b) The Indian preference does not constitute 'racial discrimination' or even 'racial' preference, but is rather an employment criterion designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. Pp. 553—554.

(c) As long as the special treatment of Indians can be tied rationally to the fulfillment of Congress' unique obligation toward Indians, such legislative judgments will not be disturbed. Pp. 554—555.

359 F.Supp. 585, reversed and remanded.

Harry R. Sachse, New Orleans, La., for appellants in No. 73 362.

Harris D. Sherman, Denver, Colo., for appellant in No. 73 364.

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Gene E. Franchini, Albuquerque, N.M., for appellees.

Mr. Justice BLACKMUN delivered the opinion of the Court.

The Indian Reorganization Act of 1934, also known as the Wheeler-Howard Act, 48 Stat. 984, 25 U.S.C. § 461 et seq., accords an employment preference for qualified Indians in the Bureau of Indian Affairs (BIA or Bureau). Appellees, non-Indian BAI employees, challenged this preference as contrary to the anti-discrimination provisions of the Equal Employment Opportunity Act of

1972, 86 Stat. 103, 42 U.S.C. § 2000e et seq. (1970 ed., Supp. II), and as violative of the Due Process Clause of the Fifth Amendment. A three-judge Federal District Court concluded that the Indian preference under the 1934 Act was impliedly repealed by the 1972 Act. 359 F.Supp. 585 (NM 1973). We noted probable jurisdiction in order to examine the statutory and constitutional validity of this longstanding Indian preference. 414 U.S. 1142, 94 S.Ct. 893, 39 L.Ed.2d 99 (1974); 415 U.S. 946, 94 S.Ct. 1467, 39 L.Ed.2d 562 (1974).

I

Section 12 of the Indian Reorganization Act, 48 Stat. 986, 25 U.S.C. § 472, provides:

'The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws,

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to the various positions maintained, now or hereafter, by the Indian Office,<sup>1</sup> in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.'<sup>2</sup>

In June 1972, pursuant to this provision, the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, issued a directive (Personnel Management Letter No. 72 12) (App. 52) stating that the BIA's policy would be to grant a preference to qualified Indians not only, as before, in the initial hiring stage, but also in the situation where an Indian and a non-Indian, both already employed by the BIA, were competing for a promotion within the Bureau.<sup>3</sup> The record indicates that this policy was implemented immediately.

Shortly thereafter, appellees, who are non-Indian employees of the BIA at Albuquerque,<sup>4</sup> instituted this class action, on behalf of themselves and other non-Indian employees similarly situated, in the United States District Court for the District of New Mexico, claiming that the 'so-called 'Indian Preference Statutes,' App. 15, were repealed by the 1972 Equal Employment Opportunity Act and deprived them of rights to property without due process of law, in violation of the Fifth Amendment.<sup>5</sup> Named as defendants were the Secretary of the Interior, the Commissioner of Indian Affairs, and the BIA Directors for the Albuquerque and Navajo Area Offices. Appellees claimed that implementation and enforcement of the new preference policy 'placed and will continue to place (appellees) at a distinct disadvantage in competing for promotion and training programs with Indian employees, all of which has and will continue to subject the (appellees) to discrimination and deny them equal employment opportunity.' App. 16.

A three-judge court was convened pursuant to 28 U.S.C. § 2282 because the complaint sought to enjoin, as unconstitutional, the enforcement of a federal statute. Appellant Amerind, a nonprofit organization representing Indian employees of the BIA, moved to intervene in support of the preference; this motion was granted by the District Court and Amerind thereafter participated at all stages of the litigation.

After a short trial focusing primarily on how the new policy, in fact, has been implemented, the District Court concluded that the Indian preference was implicitly repealed by § 11 of the Equal Employment Opportunity Act of 1972, Pub.L. 92—261, 86 Stat. 111, 42 U.S.C. § 2000e—16(a) (1970 ed., Supp. II), proscribing discrimination in most federal employment on the basis of race. <sup>6</sup>

Having found that Congress repealed the preference, it was unnecessary for the District Court to pass on its constitutionality. The court permanently enjoined appellants 'from implementing any policy in the Bureau of Indian Affairs which would hire, promote, or reassign any person in preference to another solely for the reason that such person is an Indian.' The execution and enforcement of the judgment of the District Court was

stayed by Mr. Justice Marshall on August 16, 1973, pending the disposition of this appeal.

## II

The federal policy of according some hiring preference to Indians in the Indian service dates at least as far back as 1834.<sup>7</sup> Since that time, Congress repeatedly has enacted various preferences of the general type here at issue.<sup>8</sup> The purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-government;<sup>9</sup> to further the Government's trust obliga-

tion toward the Indian tribes;<sup>10</sup> and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.<sup>11</sup>

The preference directly at issue here was enacted as an important part of the sweeping Indian Reorganization Act of 1934. The overriding purpose of that particular Act was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.<sup>12</sup> Congress was seeking to modify the then-existing situation whereby the primarily non-Indian-staffed BIA had plenary control, for all practical purposes, over the lives and destinies of the federally

recognized Indian tribes. Initial congressional proposals would have diminished substantially the role of the BIA by turning over to federally chartered self-governing Indian communities many of the func-

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tions normally performed by the Bureau.<sup>13</sup> Committee sentiment, however, ran against such a radical change in the role of the BIA.<sup>14</sup> The solution ultimately adopted was to strengthen tribal government while continuing the active role of the BIA, with the understanding that the Bureau would be more responsive to the interests of the people it was created to serve.

One of the primary means by which self-government would be fostered and the Bureau made more responsive was to increase the participation of tribal Indians in the BIA operations.<sup>15</sup> In order to achieve this end, it was recognized that some kind of preference and exemption from otherwise prevailing civil service requirements was necessary.<sup>16</sup> Congressman Howard, the House sponsor, expressed the need for the preference:

'The Indians have not only been thus deprived of civic rights and powers, but they have been largely

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deprived of the opportunity to enter the more important positions in the service of the very bureau which manages their affairs. Theoretically, the Indians have the right to qualify for the Federal civil service. In actual practice there has been no adequate program of training to qualify Indians to compete in these examinations, especially for technical and higher positions; and even if there were such training, the Indians would have to compete under existing law, on equal terms with multitudes of white applicants. . . . The various services on the Indian reservations are actually local rather than Federal services

and are comparable to local municipal and county services, since they are dealing with purely local Indian problems. It should be possible for Indians with the requisite vocational and professional training to enter the service of their own people without the necessity of competing with white applicants for these positions. This bill permits them to do so.' 78 Cong.Rec. 11729 (1934).

Congress was well aware that the proposed preference would result in employment disadvantages within the BIA for non-Indians.<sup>17</sup> Not only was this displacement unavoidable if room were to be made for Indians, but it was explicitly determined that gradual replacement of non-Indians with Indians within the Bureau was a desirable feature of the entire program for self-govern-

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ment.<sup>18</sup> Since 1934, the BIA has implemented the preference with a fair degree of success. The percentage of Indians employed in the Bureau rose from 34% in 1934 to 57% in 1972. This reversed the former downward trend, see n. 16, supra, and was due, clearly, to the presence of the 1934 Act. The Commissioner's extension of the preference in 1972 to promotions within the BIA was designed to bring more Indians into positions of responsibility and, in that regard, appears to be a logical extension of the congressional intent. See *Freeman v. Morton*, 162 U.S.App.D.C. 358, 499 F.2d 494 (1974), and n. 5, supra.

### III

It is against this background that we encounter the first issue in the present case: whether the Indian preference was repealed by the Equal Employment Opportunity Act of 1972. Title VII of the Civil Rights Act of 1964, 78 Stat. 253, was the first major piece of federal legislation prohibiting discrimination in private employment on the basis of 'race, color, religion, sex, or national origin.' 42

U.S.C. § 2000e—2(a). Significantly, §§ 701(b) and 703(i) of that Act explicitly exempted from its coverage the preferential employment of Indians by Indian tribes or by industries located on or near Indian reservations. 42 U.S.C. §§ 2000e(b) and 2000e-2(i).<sup>19</sup> This exemption reveals a clear congressional

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recognition, within the framework of Title VII, of the unique legal status of tribal and reservation-based activities. The Senate sponsor, Senator Humphrey, stated on the floor by way of explanation:

'Thus exemption is consistent with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians.' 110 Cong.Rec. 12723 (1964).<sup>20</sup>

The 1964 Act did not specifically outlaw employment discrimination by the Federal Government.<sup>21</sup> Yet the mechanism for enforcing longstanding Executive Orders forbidding Government discrimination had proved ineffective for the most part.<sup>22</sup> In order to remedy this, Congress, by the 1972 Act, amended the 1964 Act and

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proscribed discrimination in most areas of federal employment. See n. 6, supra. In general, it may be said that the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government. As stated in the House Report:

'To correct this entrenched discrimination in the Federal service, it is necessary to insure the effective application of uniform, fair and strongly enforced policies. The present law and the proposed statute do not permit industry and labor organizations to be the judges of their own conduct in the area of employment discrimination. There is

no reason why government agencies should not be treated similarly. . . .' H.R.Rep. No. 92—238, on H.R. 1746, pp. 24—25 (1971).

Nowhere in the legislative history of the 1972 Act, however, is there any mention of Indian preference.

Appellees assert, and the District Court held, that since the 1972 Act proscribed racial discrimination in Government employment, the Act necessarily, albeit sub silentio, repealed the provision of the 1934 Act that called for the preference in the BIA of one racial group, Indians, over non-Indians:

'When a conflict such as in this case, is present, the most recent law or Act should apply and the conflicting Preferences passed some 39 years earlier should be impliedly repealed.' Brief for Appellees 7.

We disagree. For several reasons we conclude that Congress did not intend to repeal the Indian preference and that the District Court erred in holding that it was repealed.

First: There are the above-mentioned affirmative provisions in the 1964 Act excluding coverage of tribal em-

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ployment and of preferential treatment by a business or enterprise on or near a reservation. 42 U.S.C. §§ 2000e(b) and 2000e—2(i). See n. 19, supra. These 1964 exemptions as to private employment indicate Congress' recognition of the longstanding federal policy of providing a unique legal status to Indians in matters concerning tribal or 'on or near' reservation employment. The exemptions reveal a clear congressional sentiment that an Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination of the type otherwise proscribed. In extending the general anti-

discrimination machinery to federal employment in 1972, Congress in no way modified these private employment preferences built into the 1964 Act, and they are still in effect. It would be anomalous to conclude that Congress intended to eliminate the longstanding statutory preferences in BIA employment, as being racially discriminatory, at the very same time it was reaffirming the right of tribal and reservation-related private employers to provide Indian preference. Appellees' assertion that Congress implicitly repealed the preference as racially discriminatory, while retaining the 1964 preferences, attributes to Congress irrationality and arbitrariness, an attribution we do not share.

Second: Three months after Congress passed the 1972 amendments, it enacted two new Indian preference laws. These were part of the Education Amendments of 1972, 86 Stat. 235, 20 U.S.C. §§ 887c(a) and (d), and § 1119a (1970 ed., Supp. II). The new laws explicitly require that Indians be given preference in Government programs for training teachers of Indian children. It is improbable, to say the least, that the same Congress which affirmatively approved and enacted these additional and similar Indian preferences was, at the same time, con-

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demning the BIA preference as racially discriminatory. In the total absence of any manifestation of supportive intent, we are loathe to imply this improbable result.

Third: Indian preferences, for many years, have been treated as exceptions to Executive Orders forbidding Government employment discrimination.<sup>23</sup> The 1972 extension of the Civil Rights Act to Government employment is in large part merely a codification of prior anti-discrimination Executive Orders that had proved ineffective because of inadequate enforcement machinery. There certainly was

no indication that the substantive proscription against discrimination was intended to be any broader than that which previously existed. By codifying the existing anti-discrimination provisions, and by providing enforcement machinery for them, there is no reason to presume that Congress affirmatively intended to erase the preferences that previously had co-existed with broad anti-discrimination provisions in Executive Orders.

Fourth: Appellees encounter head-on the 'cardinal rule . . . that repeals by implication are not favored.' *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed. 351 (1936); *Wood v. United States*, 16 Pet. 342—343, 363, 10 L.Ed. 987 (1842); *Universal Interpretive Shuttle Corp. v. Washington*

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*Metropolitan Area Transit Comm'n*, 393 U.S. 186, 193, 89 S.Ct. 354, 358, 21 L.Ed.2d 334 (1968). They and the District Court read the congressional silence as effectuating a repeal by implication. There is nothing in the legislative history, however, that indicates affirmatively any congressional intent to repeal the 1934 preference. Indeed, as explained above, there is ample independent evidence that the legislative intent was to the contrary.

This is a prototypical case where an adjudication of repeal by implication is not appropriate. The preference is a longstanding, important component of the Government's Indian program. the anti-discrimination provision, aimed at alleviating minority discrimination in employment, obviously is designed to deal with an entirely different and, indeed, opposite problem. Any perceived conflict is thus more apparent than real.

In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by

implication is when the earlier and later statutes are irreconcilable. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456 457, 65 S.Ct. 716, 725—726, 89 L.Ed. 1051 (1945). Clearly, this is not the case here. A provision aimed at furthering Indian self-government by according an employment preference within the BIA for qualified members of the governed group can readily co-exist with a general rule prohibiting employment discrimination on the basis of race. Any other conclusion can be reached only by formalistic reasoning that ignores both the history and purposes of the preference and the unique legal relationship between the Federal Government and tribal Indians.

Furthermore, the Indian preference statute is a specific provision applying to a very specific situation. The 1972 Act, on the other hand, is of general application. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general

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one, regardless of the priority of enactment. See, e.g., *Bulova Watch Co. v. United States*, 365 U.S. 753, 758, 81 S.Ct. 864, 6 L.Ed.2d 72 (1961); *Rodgers v. United States*, 185 U.S. 83, 87—89, 22 S.Ct. 582, 583—584, 46 L.Ed. 816 (1902).

The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. 'When there are two acts upon the same subject, the rule is to give effect to both if possible . . . The intention of the legislature to repeal 'must be clear and manifest.'" *United States v. Borden Co.*, 308 U.S. 188, 198, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939). In light of the factors indicating no repeal, we simply cannot conclude that Congress consciously abandoned its policy of furthering Indian self-

government when it passed the 1972 amendments.

We therefore hold that the District Court erred in ruling that the Indian preference was repealed by the 1972 Act.

IV

We still must decide whether, as the appellees contend, the preference constitutes invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). The District Court, while pretermittting this issue, said: '(W)e could well hold that the statute must fail on constitutional grounds.' 359 F.Supp., at 591.

Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and im-

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PLICITLY from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to 'regulate Commerce . . . with the Indian Tribes,' and thus, to this extent, singles Indians out as a proper subject for separate legislation. Article II, § 2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the Government's power to deal with the Indian tribes. The Court has described the origin and nature of the special relationship:

'In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an

uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. . . .' Board of County Comm'rs v. Seber, 318 U.S. 705, 715, 63 S.Ct. 920, 926, 87 L.Ed. 1094 (1943).

See also *United States v. Kagama*, 118 U.S. 375, 383—384, 6 S.Ct. 1109, 1113—1114, 30 L.Ed. 228 (1886).

Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized. See

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*Simmons v. Eagle Seelatsee*, 244 F.Supp. 808, 814 n. 13 (ED Wash.1965), *aff'd*, 384 U.S. 209, 86 S.Ct. 1459, 16 L.Ed.2d 480 (1966).

It is in this historical and legal context that the constitutional validity of the Indian preference is to be determined. As discussed above, Congress in 1934 determined that proper fulfillment of its trust required turning over to the Indians a greater control of their own destinies. The overly paternalistic approach of prior years had proved both exploitative and destructive of Indian interests. Congress was united in the belief that institutional changes were required. An important part of the Indian Reorganization

Act was the preference provision here at issue.

Contrary to the characterization made by appellees, this preference does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference.<sup>24</sup>

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Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency. The preference is similar in kind to the constitutional requirement that a United States Senator, when elected, be 'an Inhabitant of that State for which he shall be chosen,' Art. I, § 3, cl. 3, or that a member of a city council reside within the city governed by the council. Congress has sought only to enable the BIA to draw more heavily from among the constituent group in staffing its projects, all of which, either directly or indirectly, affect the lives of tribal Indians. The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. See n. 24, *supra*. In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *suigeneris*.<sup>25</sup> Furthermore, the preference applies only to employment in the Indian service. The preference does not cover any other Government agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations. Here, the preference is reasonably and directly related to a legitimate, nonracially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination.

On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular

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and special treatment. See, e.g., *Board of County Comm'rs v. Seber*, 318 U.S. 705, 63 S.Ct. 920, 87 L.Ed. 1094 (1943) (federally granted tax immunity); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) (same); *Simmons v. Eagle Seelatsee*, 384 U.S. 209, 86 S.Ct. 1459, 16 L.Ed.2d 480 (1966), *aff'g* 244 F.Supp. 808 (ED Wash.1965) (statutory definition of tribal membership, with resulting interest in trust estate); *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) (tribal courts and their jurisdiction over reservation affairs). Cf. *Morton v. Ruiz*, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974) (federal welfare benefits for Indians 'on or near' reservations). This unique legal status is of long standing, see *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L.Ed. 25 (1831); *Worcester v. Georgia*, 6 Pet. 515, 8 L.Ed. 483 (1832), and its sources are diverse. See generally U.S. Dept. of Interior, *Federal Indian Law* (1958); Comment, *The Indian Battle for Self-Determination*, 58 Calif.L.Rev. 445 (1970). As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.

The judgment of the District Court is reversed and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Judgment reversed and case remanded.

<sup>1</sup> The Indian Health Service was transferred in 1954 from the Department of the Interior to the Department of Health, Education and Welfare. Act of Aug. 5, 1954, § 1, 68 Stat. 674, 42 U.S.C. § 2001. Presumably, despite this transfer, the reference in § 12 to the 'Indian Office' has continuing application to the Indian Health Service. See 5 CFR § 213.3116(b)(8).

<sup>2</sup> There are earlier and more narrowly drawn Indian preference statutes. 25 U.S.C. §§ 44, 45, 46, 47, and 274. For all practical purposes, these were replaced by the broader preference of § 12. Although not directly challenged in this litigation, these statutes, under the District Court's decision, clearly would be invalidated.

<sup>3</sup> The directive stated:

'The Secretary of the Interior announced today (June 26, 1972) he has approved the Bureau's policy to extend Indian Preference to training and to filling vacancies by original appointment, reinstatement and promotions. The new policy was discussed with the National President of the National Federation of Federal Employees under National Consultation Rights NFFE has with the Department. Secretary Morton and I jointly stress that careful attention must be given to protecting the Rights of non-Indian employees. The new policy provides as follows: Where two or more candidates who meet the established qualification requirements are available for filling a vacancy. If one of them is an Indian, he shall be given preference in filling the vacancy. This new policy is effective immediately, and is incorporated into all existing programs such as the Promotion Program. Revised Manual releases will be issued promptly for review and comment. You should take immediate steps to notify all employees and recognized unions of this policy.' App. 52—53.

4. The appellees state that none of them is employed on or near an Indian reservation. Brief for Appellees 8. The District Court described the appellees as 'teachers . . . or programmers, or in computer work.' 359 F.Supp. 585, 587 (NM 1973).

5. The specific question whether § 12 of the 1934 Act authorizes a preference in promotion as well as in initial hiring was not decided by the District Court and is not now before us. We express no opinion on this issue. See *Freeman v. Morton*, 162 U.S.App.D.C. 358, 499 F.2d 494 (1974). See also *Mescalero Apache Tribe v. Hickel*, 432 F.2d 956 (CA10 1970), cert. denied, 401 U.S. 981, 91 S.Ct. 1195, 28 L.Ed.2d 333 (1971) (preference held inapplicable to reduction in force).

6. Section 2000e—16(a) reads:

'All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies (other than the General Accounting Office) as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.'

7. Act of June 30, 1834, § 9, 4 Stat. 737, 25 U.S.C. § 45:

'(I)n all cases of the appointments of interpreters or other persons employed for

the benefit of the Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties.'

8. Act of May 17, 1882, § 6, 22 Stat. 88, and Act of July 4, 1884, § 6, 23 Stat. 97, 25 U.S.C. § 46 (employment of clerical, mechanical, and other help on reservations and about agencies); Act of Aug. 15, 1894, § 10, 28 Stat. 313, 25 U.S.C. § 44 (employment of herders, teamsters, and laborers, 'and where practicable in all other employments' in the Indian service); Act of June 7, 1897, § 1, 30 Stat. 83, 25 U.S.C. § 274 (employment as matrons, farmers, and industrial teachers in Indian schools); Act of June 25, 1910, § 23, 36 Stat. 861, 25 U.S.C. § 47 (general preference as to Indian labor and products of Indian industry).

9. Senator Wheeler, cosponsor of the 1934 Act, explained the need for a preference as follows:

'We are setting up in the United States a civil service rule which prevents Indians from managing their own property. It is an entirely different service from anything else in the United States, because these Indians own this property. It belongs to them. What the policy of this Government is and what it should be is to teach these Indians to manage their own business and control their own funds and to administer their own property, and the civil service has worked very poorly so far as the Indian Service is concerned . . . .' Hearings on S. 2755 and S. 3645 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 2, p. 256 (1934).

10. A letter, contained in the House Report to the 1934 Act, from President F. D. Roosevelt to Congressman Howard states:

'We can and should, without further delay, extend to the Indian the fundamental rights of political liberty and local self-government

and the opportunities of education and economic assistance that they require in order to attain a wholesome American life. This is but the obligation of honor of a powerful nation toward a people living among us and dependent upon our protection.' H.R.Rep.No.1804, 73d Cong., 2d Sess., 8 (1934).

11. 'If the Indians are exposed to any danger, there is none greater than the residence among them of unprincipled white men.' H.R.Rep.No.474, 23d Cong., 1st Sess., 98 (1834) (letter dated Feb. 10, 1834, from Indian Commissioners to the Secretary of War).

12. As explained by John Collier, Commissioner of Indian Affairs:

'(T)his bill is designed not to prevent the absorption of Indians in white communities, but rather to provide for those Indians unwilling or unable to compete in the white world some measures of self-government in their own affairs.' Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 1, p. 26 (1934).

13. Hearings on H.R. 7902, Readjustment of Indian Affairs, 73d Cong., 2d Sess., 1—7 (1934) (hereafter House Hearings). See also *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152—153, n. 9, 93 S.Ct. 1267, 1272—1273, 36 L.Ed.2d 114 (1973).

14. House Hearings 491—497.

15. '(Section 12) was intended to integrate the Indian into the government service connected with the administration of his affairs. Congress was anxious to promote economic and political self-determination for the Indian' (footnote omitted). *Mescalero Apache Tribe v. Hickel*, 432 F.2d, at 960 (footnote omitted).

16. The bill admits qualified Indians to the position (sic) in their own service.

'Thirty-four years ago, in 1900, the number of Indians holding regular positions in the Indian Service, in proportion to the total of positions, was greater than it is today.

'The reason primarily is found in the application of the generalized civil service to the Indian Service, and the consequent exclusion of Indians from their own jobs.' House Hearings 19 (memorandum dated Feb. 19, 1934, submitted by Commissioner Collier to the Senate and House Committees on Indian Affairs).

17. Congressman Carter, an opponent of the bill, placed in the Congressional Record the following observation by Commissioner Collier at the Committee hearings:

'(W)e must not blind ourselves to the fact that the effect of this bill if worked out would unquestionably be to replace white employees by Indian employees. I do not know how fast, but ultimately it ought to go very far indeed.' 78 Cong.Rec. 11737 (1934).

18. 'It should be possible for Indians to enter the service of their own people without running the gauntlet of competition with whites for these positions. Indian progress and ambition will be enormously strengthened as soon as we adopt the principle that the Indian Service shall gradually become, in fact as well as in name, an Indian service predominantly in the hands of educated and competent Indians.' *Id.*, at 11731 (remarks of Cong. Howard).

19. Section 701(b) excludes 'an Indian Tribe' from the Act's definition of 'employer.' Section 703(i) states:

'Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any

publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.'

20. Senator Mundt supported these exemptions on the Senate floor by claiming that they would allow Indians 'to benefit from Indian preference programs now in operation or later to be instituted.' 110 Cong.Rec. 13702 (1964).

21. The 1964 Act, however, did contain a proviso, expressed in somewhat precatory language:

'That it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex or national origin.' 78 Stat. 254.

This statement of policy was re-enacted as 5 U.S.C. § 7151, 80 Stat. 523 (1963), and the 1964 Act's proviso was repealed, *id.*, at 662.

22. 'This disproportionate (sic) distribution of minorities and women throughout the Federal bureaucracy and their exclusion from higher level policy-making and supervisory positions indicates the government's failure to pursue its policy of equal opportunity.

'A critical defect of the Federal equal employment program has been the failure of the complaint process. That process has impeded rather than advanced the goal of the elimination of discrimination in Federal employment. . . .' H.R.Rep.No.92-238, on H.R. 1746, pp. 23-24 (1971).

23. See, e.g., Exec.Order No. 7423, July 26, 1936, 1 Fed.Reg. 885-886, 3 CFR 189 (1936-1938 Comp.). When President Eisenhower issued an Order prohibiting discrimination on the basis of race in the civil service, Exce. Order No. 10577, § 4.2, Nov. 22,

1954, 19 Fed.Reg. 7521, 3 CFR 218 (1957-1958 Comp.), he left standing earlier Executive Orders containing exceptions for the Indian service. *Id.*, § 301. See also 5 CFR § 213.3112(a)(7), which provides a civil service exemption for:

'All positions in the Bureau of Indian Affairs and other positions in the Department of the Interior directly and primarily related to the providing of services to Indians when filled by the appointment of Indians who are one-fourth or more Indian blood.'

See also 5 CFR § 213.3116(b)(8) (Indian Health Services).

24. The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature. The eligibility criteria appear in 44 BIAM 335, 3.1:

'1. Policy—An Indian has preference in appointment in the Bureau. To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe. It is the policy for promotional consideration that where two or more candidates who met the established qualification requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. In accordance with the policy statement approved by the Secretary, the Commissioner may grant exceptions to this policy by approving the selection and appointment of non-Indians, when the he considers it in the best interest of the Bureau.

'This program does not restrict the right of management to fill positions by methods other than through promotion. Positions may

be filled by transfers, reassignment, reinstatement, or initial appointment.' App. 92.

<sup>25</sup>. Senator Wheeler described the BIA as 'an entirely different service from anything else in the United States.' Hearings on S. 2755 and S. 3645 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 2, p. 256 (1934).



**436 U.S. 49**  
**98 S.Ct. 1670**  
**56 L.Ed.2d 106**  
**SANTA CLARA PUEBLO et al.,**  
**Petitioners,**

**v.**

**Julia MARTINEZ et al.**

**No. 76-682.**

Argued Nov. 29, 1977.

Decided May 15, 1978.

*Syllabus*

Respondents, a female member of the Santa Clara Pueblo and her daughter, brought this action for declaratory and injunctive relief against petitioners, the Pueblo and its Governor, alleging that a Pueblo ordinance that denies tribal membership to the children of female members who marry outside the tribe, but not to similarly situated children of men of that tribe, violates Title I of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-1303, which in relevant part provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws." 25 U.S.C. § 1302(8). The ICRA's only express remedial provision, 25 U.S.C. § 1303, extends the writ of habeas corpus to any person, in a federal court, "to test the legality of his detention by order of an Indian tribe." The District Court held that jurisdiction was conferred by 28 U.S.C. § 1343(4) and 25 U.S.C. § 1302(8), apparently concluding that the substantive provisions of Title I impliedly authorized civil actions for declaratory and injunctive relief, and also that the tribe was not immune from such a suit. Subsequently, the court found for petitioners on the merits. The Court of Appeals, while agreeing on the jurisdictional issue, reversed on the merits.

*Held:*

1. Suits against the tribe under the ICRA are barred by the tribe's sovereign immunity from suit, since nothing on the face

of the ICRA purports to subject tribes to the jurisdiction of federal courts in civil actions for declaratory or injunctive relief. Pp. 58-59.

2. Nor does § 1302 impliedly authorize a private cause of action for declaratory and injunctive relief against the Pueblo's Governor. Congress' failure to provide remedies other than habeas corpus for enforcement of the ICRA was deliberate, as is manifest from the structure of the statutory scheme and the legislative history of Title I. Pp. 59-72.

(a) Congress was committed to the goal of tribal self-determination, as is evidenced by the provisions of Title I itself. Section 1302 selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique needs of tribal governments, and other parts of the ICRA similarly manifest a congressional purpose to protect tribal sovereignty from undue interference. Creation of a federal cause

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of action for the enforcement of § 1302 rights would not comport with the congressional goal of protecting tribal self-government. Pp. 62-65.

(b) Tribal courts, which have repeatedly been recognized as appropriate forums for adjudicating disputes involving important interests of both Indians and non-Indians, are available to vindicate rights created by the ICRA. Pp. 65-66.

(c) After considering numerous alternatives for review of tribal criminal convictions, Congress apparently decided that review by way of habeas corpus would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments. Similarly, Congress considered and rejected proposals for federal review of alleged violations of the ICRA arising in a civil context. It is thus clear that

only the limited review mechanism of § 1303 was contemplated. Pp. 66-70.

(d) By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under § 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom that tribal forums may be in a better position to evaluate than federal courts. Pp. 71-72.

10th Cir., 540 F.2d 1039, reversed.

Marcelino Prelo, Jr., Albuquerque, N. M., for petitioners.

Richard B. Collins, Window Rock, Ariz., for respondents.

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Mr. Justice MARSHALL delivered the opinion of the Court.\*

This case requires us to decide whether a federal court may pass on the validity of an Indian tribe's ordinance denying membership to the children of certain female tribal members.

Petitioner Santa Clara Pueblo is an Indian tribe that has been in existence for over 600 years. Respondents, a female member of the tribe and her daughter, brought suit in federal court against the tribe and its Governor, petitioner Lucario Padilla, seeking declaratory and injunctive relief against enforcement of a tribal ordinance denying membership in the tribe to children of female members who marry outside the tribe, while extending membership to children of male members who marry outside the tribe. Respondents claimed that this rule discriminates on the basis of both sex and ancestry in violation of Title I of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§

1301-1303, which provides in relevant part that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws." § 1302(8).<sup>1</sup>

Title I of the ICRA does not expressly authorize the bringing of civil actions for declaratory or injunctive relief to

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enforce its substantive provisions. The threshold issue in this case is thus whether the Act may be interpreted to impliedly authorize such actions, against a tribe or its officers in the federal courts. For the reasons set forth below, we hold that the Act cannot be so read.

I

Respondent Julia Martinez is a full-blooded member of the Santa Clara Pueblo, and resides on the Santa Clara Reservation in Northern New Mexico. In 1941 she married a Navajo Indian with whom she has since had several children, including respondent Audrey Martinez. Two years before this marriage, the Pueblo passed the membership ordinance here at issue, which bars admission of the Martinez children to the tribe because their father is not a Santa Claraan.<sup>2</sup> Although the children were raised on the reservation and continue to reside there now that they are adults, as a result of their exclusion from membership they may not vote in tribal elections or hold secular office in the tribe; moreover, they have no right to remain on the reservation in the event of their

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mother's death, or to inherit their mother's home or her possessory interests in the communal lands.

After unsuccessful efforts to persuade the tribe to change the membership rule,

respondents filed this lawsuit in the United States District Court for the District of New Mexico, on behalf of themselves and others similarly situated.<sup>3</sup> Petitioners moved to dismiss the complaint on the ground that the court lacked jurisdiction to decide intratribal controversies affecting matters of tribal self-government and sovereignty. The District Court rejected petitioners' contention, finding that jurisdiction was conferred by 28 U.S.C. § 1343(4) and 25 U.S.C. § 1302(8). The court apparently concluded, first, that the substantive provisions of Title I impliedly authorized civil actions for declaratory and injunctive relief, and second, that the tribe was not immune from such suit.<sup>4</sup> Accordingly, the motion to dismiss was denied. 402 F.Supp. 5 (1975).

Following a full trial, the District Court found for petitioners on the merits. While acknowledging the relatively recent origin of the disputed rule, the District Court never-

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theless found it to reflect traditional values of patriarchy still significant in tribal life. The court recognized the vital importance of respondents' interests,<sup>5</sup> but also determined that membership rules were "no more or less than a mechanism of social . . . self-definition," and as such were basic to the tribe's survival as a cultural and economic entity. *Id.*, at 15.<sup>6</sup> In sustaining the ordinance's validity under the "equal protection clause" of the ICRA, 25 U.S.C. § 1302(8), the District Court concluded that the balance to be struck between these competing interests was better left to the judgment of the Pueblo:

"[T]he equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and should therefore be preserved . . . . Such a determination should be made by the

people of Santa Clara; not only because they can best decide what values are important, but also because they must live with the decision every day. . . .

". . . To abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it." 402 F.Supp., at 18-19.

On respondents' appeal, the Court of Appeals for the Tenth Circuit upheld the District Court's determination that 28 U.S.C. § 1343(4) provides a jurisdictional basis for actions

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under Title I of the ICRA. 540 F.2d 1039, 1042 (1976). It found that "since [the ICRA] was designed to provide protection against tribal authority, the intention of Congress to allow suits against the tribe was an essential aspect [of the ICRA]. Otherwise, it would constitute a mere unenforceable declaration of principles." *Ibid.* The Court of Appeals disagreed, however, with the District Court's ruling on the merits. While recognizing that standards of analysis developed under the Fourteenth Amendment's Equal Protection Clause were not necessarily controlling in the interpretation of this statute, the Court of Appeals apparently concluded that because the classification was one based upon sex it was presumptively invidious and could be sustained only if justified by a compelling tribal interest. See *id.*, at 1047-1048. Because of the ordinance's recent vintage, and because in the court's view the rule did not rationally identify those persons who were emotionally and culturally Santa Clarans, the court held that the tribe's interest in the ordinance was not substantial enough to justify its discriminatory effect. *Ibid.*

We granted certiorari, 431 U.S. 913, 97 S.Ct. 2172, 53 L.Ed.2d 223 (1977), and we now reverse.

## II

Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Worcester v. Georgia*, 6 Pet. 515, 559, 8 L.Ed. 483 (1832); see *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975); F. Cohen, Handbook of Federal Indian Law 122-123 (1945). Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381-382, 6 S.Ct. 1109, 1112-1113, 30 L.Ed. 228 (1886). See *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). They have power to make their own substantive law in internal matters, see *Roff v. Burney*, 168 U.S. 218, 18 S.Ct. 60, 42 L.Ed. 442 (1897) (mem-

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bership)s *Jones v. Meehan*, 175 U.S. 1, 29, 20 S.Ct. 1, 12, 44 L.Ed. 49 (1899) (inheritance rules); *United States v. Quiver*, 241 U.S. 602, 36 S.Ct. 699, 60 L.Ed. 1176 (1916) (domestic relations), and to enforce that law in their own forums, see *e. g., Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. Thus, in *Talton v. Mayes*, 163 U.S. 376, 16 S.Ct. 986, 41 L.Ed. 196 (1896), this Court held that the Fifth Amendment did not "operat[e] upon" "the powers of local self-government enjoyed" by the tribes. *Id.*, at 384, 16 S.Ct. at 989. In ensuing years the lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights, as well as to the Fourteenth Amendment.<sup>7</sup>

As the Court in *Talton* recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess. *Ibid.* See, *e. g., United States v. Kagama*, *supra*, 118 U.S.,

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at 379-381, 383-384, 6 S.Ct., at 1111-1112, 1113-1114; *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 305-307, 23 S.Ct. 115, 119, 47 L.Ed. 183 (1902). Title I of the ICRA, 25 U.S.C. §§ 1301-1303, represents an exercise of that authority. In 25 U.S.C. § 1302, Congress acted to modify the effect of *Talton* and its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment.<sup>8</sup>

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In 25 U.S.C. § 1303, the only remedial provision expressly supplied by Congress, the "privilege of the writ of habeas corpus" is made "available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

Petitioners concede that § 1302 modifies the substantive law applicable to the tribe; they urge, however, that Congress did not intend to authorize federal courts to review violations of its provisions except as they might arise on habeas corpus. They argue, further, that Congress did not waive the tribe's sovereign immunity from suit. Respondents, on the other hand, contend that § 1302 not only modifies the substantive law applicable to the exercise of sovereign tribal powers, but also authorizes civil suits for equitable relief against the tribe and its officers in federal courts. We consider these contentions first with respect to the tribe.

## III

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner v. United States*, 248 U.S. 354, 358, 39 S.Ct. 109, 110, 63 L.Ed. 291 (1919); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940); *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 172-173, 97 S.Ct. 2616, 2620-2621, 53 L.Ed.2d 667 (1977). This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congressional authorization," the "Indian Nations are exempt from suit." *United States v. United States Fidelity & Guaranty Co.*, *supra*, 309 U.S., at 512, 60 S.Ct. at 656.

It is settled that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976), quoting, *United*

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*States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1502, 23 L.Ed.2d 52 (1969). Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. Moreover, since the respondent in a habeas corpus action is the individual custodian of the prisoner, see, *e. g.*, 28 U.S.C. § 2243, the provisions of § 1303 can hardly be read as a general waiver of the tribe's sovereign immunity. In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.

IV

As an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe's immunity from suit. See *Puyallup Tribe, Inc. v. Washington Dept. of Game*, *supra*, 433

U.S., at 171-172, 97 S.Ct., at 2620-2621; cf. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). We must therefore determine whether the cause of action for declaratory and injunctive relief asserted here by respondents, though not expressly authorized by the statute, is nonetheless implicit in its terms.

In addressing this inquiry, we must bear in mind that providing a federal forum for issues arising under § 1302 constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself. Even in matters involving commercial and domestic relations, we have recognized that "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves," *Fisher v. District Court*, 424 U.S. 382, 387-388, 96 S.Ct. 943, 947, 47 L.Ed.2d 106 (1976), may "undermine the authority of the tribal cour[T] . . . AND HENCE . . . infringe on the right of the Indians to govern themselves." *Williams v. Lee*, 358 U.S., at 223, 79 S.Ct., at 272.<sup>9</sup>

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A fortiori, resolution in a foreign forum of intratribal disputes of a more "public" character, such as the one in this case, cannot help but unsettle a tribal government's ability to maintain authority. Although Congress clearly has power to authorize civil actions against tribal officers, and has done so with respect to habeas corpus relief in § 1303, a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent. Cf. *Antoine v. Washington*, 420 U.S. 194, 199-200, 95 S.Ct. 944, 948, 43 L.Ed.2d 129 (1975); *Choate v. Trapp*, 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912).

With these considerations of "Indian sovereignty . . . [as] a backdrop against which the applicable . . . federal statut[e] must be read," *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172, 93 S.Ct. 1257, 1262, 36 L.Ed.2d 129 (1973), we turn now to those factors of more general relevance in determining whether a cause of action is implicit in a statute not expressly providing one. See *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975).<sup>10</sup> We note at the outset that

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acentral purpose of the ICRA and in particular of Title I was to "secur[e] for the American Indian the broad constitutional rights afforded to other Americans," and thereby to "protect individual Indians from arbitrary and unjust actions of tribal governments." S.Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967). There is thus no doubt that respondents, American Indians living on the Santa Clara Reservation, are among the class for whose especial benefit this legislation was enacted. *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39, 36 S.Ct. 482, 484, 60 L.Ed. 874 (1916); see *Cort v. Ash*, *supra*, 422 U.S., at 78, 95 S.Ct., at 2087. Moreover, we have frequently recognized the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms. See, e. g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 414 n. 13, 88 S.Ct. 2186, 2189, 20 L.Ed.2d 1189 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238-240, 90 S.Ct. 400, 405-406, 24 L.Ed.2d 386 (1969). See also *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). These precedents, however, are simply not dispositive here. Not only are we unpersuaded that a judicially sanctioned intrusion into tribal sovereignty is required to fulfill the purposes of the ICRA, but to the contrary, the structure of the statutory scheme and the legislative history of Title I suggest that Congress' failure to provide

remedies other than habeas corpus was a deliberate one. See *National Railroad Passenger Corp. v. Na-*

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*tional Assn. of Railroad Passengers*, 414 U.S. 453, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974); *Cort v. Ash*, *supra*.

Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well-established federal "policy of furthering Indian self-government." *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974); see *Fisher v. District Court*, 424 U.S., at 391, 96 S.Ct. at 948.<sup>11</sup> This commitment to the goal of tribal self-determination is demonstrated by the provisions of Title I itself. Section 1302, rather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments, as had been initially proposed,<sup>12</sup> selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal gov-

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ernments.<sup>13</sup> See n. 8, *supra*. Thus, for example, the statute does not prohibit the establishment of religion, nor does it require jury trials in civil cases, or appointment of counsel for indigents in criminal cases, cf. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).<sup>14</sup>

The other Titles of the ICRA also manifest a congressional purpose to protect tribal sovereignty from undue interference. For instance, Title III, 25 U.S.C. §§ 1321-1326, hailed by some of the ICRA's supporters as the most important part of the Act,<sup>15</sup> provides that States may not assume civil or criminal jurisdiction over "Indian country" without

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the prior consent of the tribe, thereby abrogating prior law to the contrary.<sup>16</sup> Other Titles of the ICRA provide for strengthening certain tribal courts through training of Indian judges,<sup>17</sup> and for minimizing interference by the Federal Bureau of Indian Affairs in tribal litigation.<sup>18</sup>

Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other. Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government. Not only would it undermine the authority of tribal forums, see *supra*, at 59-60, but it would also impose serious financial burdens on already "financially disadvantaged" tribes. Subcommittee on Constitutional Rights, Senate Judiciary Committee, Constitutional

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Rights of the American Indian: Summary Report of Hearings and Investigations Pursuant to S.Res. 194, 89th Cong., 2d Sess., 12 (Comm. Print 1966) (hereinafter cited as Summary Report).<sup>19</sup>

Moreover, contrary to the reasoning of the court below, implication of a federal remedy in addition to habeas corpus is not plainly required to give effect to Congress' objective of extending constitutional norms to tribal self-government. Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply.<sup>20</sup> Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important

personal and property interests of both Indians and non-Indians.<sup>21</sup> See, e. g., *Fisher v. District Court*, 424 U.S.

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382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976); *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). See also *Ex parte Crow Dog*, 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030 (1883). Nonjudicial tribal institutions have also been recognized as competent law-applying bodies. See *United States v. Mazurie*, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975).<sup>22</sup> Under these circumstances, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief.

B

Our reluctance is strongly reinforced by the specific legislative history underlying 25 U.S.C. § 1303. This history, extending over more than three years,<sup>23</sup> indicates that Congress' provision for habeas corpus relief, and nothing more, reflected a considered accommodation of the competing goals of "preventing injustices perpetrated by tribal governments,

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on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people." Summary Report 11.

In settling on habeas corpus as the exclusive means for federal-court review of tribal criminal proceedings, Congress opted for a less intrusive review mechanism than had been initially proposed. Originally, the legislation would have authorized *de novo* review in federal court of all convictions obtained in tribal courts.<sup>24</sup> At hearings held on the proposed legislation in 1965, however, it became clear that even those in agreement

with the general thrust of the review provision—to provide some form of judicial review of criminal proceedings in tribal courts—believed that *de novo* review would impose unmanageable financial burdens on tribal governments and needlessly displace tribal courts. See *id.*, at 12; 1965 Hearings 22-23, 157, 162, 341-342. Moreover, tribal representatives argued that *de novo* review would "deprive the tribal court of all jurisdiction in the event of an appeal, thus having a harmful effect upon law enforcement within the reservation," and urged instead that "decisions of tribal courts . . . be reviewed in the U.S. district courts upon petition for a writ of habeas corpus." *Id.*, at 79. After considering numerous alternatives for review of tribal convictions, Congress apparently decided that review by way of habeas corpus would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments.

Similarly, and of more direct import to the issue in this case, Congress considered and rejected proposals for federal review of alleged violations of the Act arising in a civil context. As initially introduced, the Act would have required the Attorney General to "receive and investigate" complaints

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relating to deprivations of an Indian's statutory or constitutional rights, and to bring "such criminal or other action as he deems appropriate to vindicate and secure such right to such Indian."<sup>25</sup> Notwithstanding the screening effect this proposal would have had on frivolous or vexatious lawsuits, it was bitterly opposed by several tribes. The Crow Tribe representative stated:

"This [bill] would in effect subject the tribal sovereignty of self-government to the Federal government. . . . [B]y its broad terms [it] would allow the Attorney General to bring any kind of action as he deems appropriate. By this bill, any time a member

of the tribe would not be satisfied with an action by the [tribal] council, it would allow them [*sic*] to file a complaint with the Attorney General and subject the tribe to a multitude of investigations and threat of court action." 1965 Hearings 235 (statement of Mr. Real Bird).

In a similar vein, the Mescalero Apache Tribal Council argued that "[i]f the perpetually dissatisfied individual Indian were to be armed with legislation such as proposed in [this bill] he could disrupt the whole of a tribal government." *Id.*, at 343. In response, this provision for suit by the Attorney General was completely eliminated from the ICRA. At the same time, Congress rejected a substitute proposed by the Interior Department that would have authorized the Department to adjudicate civil complaints concerning tribal actions, with review in the district courts available from final decisions of the agency.<sup>26</sup>

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Given this history, it is highly unlikely that Congress would have intended a private cause of action for injunctive and declaratory relief to be available in the federal courts to secure enforcement of § 1302. Although the only Committee Report on the ICRA in its final form, S.Rep. No. 841, 90th Cong., 1st Sess. (1967), sheds little additional light on this question, it would hardly support a contrary conclusion.<sup>27</sup> Indeed its description of the purpose of Title I,<sup>28</sup> as well as the floor

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debates on the bill,<sup>29</sup> indicates that the ICRA was generally understood to authorize federal judicial review of tribal actions only through the habeas corpus provisions of § 1303.<sup>30</sup> These factors, together with Congress' rejection of proposals that clearly would have authorized causes of action other than habeas corpus, persuade us that Congress, aware of the intrusive effect of federal judicial review

upon tribal self-government, intended to create only a limited mechanism for such review, namely, that provided for expressly in § 1303.

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V

As the bill's chief sponsor, Senator Ervin,<sup>31</sup> commented in urging its passage, the ICRA "should not be considered as the final solution to the many serious constitutional problems confronting the American Indian." 113 Cong.Rec. 13473 (1967). Although Congress explored the extent to which tribes were adhering to constitutional norms in both civil and criminal contexts, its legislative investigation revealed that the most serious abuses of tribal power had occurred in the administration of criminal justice. See *ibid.*, quoting Summary Report 24. In light of this finding, and given Congress' desire not to intrude needlessly on tribal self-government, it is not surprising that Congress chose at this stage to provide for federal review only in habeas corpus proceedings.

By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under § 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts. Our relations with the Indian tribes have "always been . . . anomalous . . . and of a complex character." *United States v. Kagama*, 118 U.S., at 381, 6 S.Ct., at 1112. Although we early rejected the notion that Indian tribes are "foreign states" for jurisdictional purposes under Art. III, *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L.Ed. 25 (1831), we have also recognized that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty

are in many ways foreign to the constitutional institutions of the federal and state governments. See *Elk v. Wilkins*, 112 U.S. 94, 5 S.Ct. 41, 28 L.Ed. 643 (1884). As is suggested by the District Court's opinion in this case, see *supra*, at 54,

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efforts by the federal judiciary to apply the statutory prohibitions of § 1302 in a civil context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity.<sup>32</sup>

As we have repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565, 23 S.Ct. 216, 221, 47 L.Ed. 299 (1903). Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.

The judgment of the Court of Appeals, is, accordingly,

*Reversed.*

Mr. Justice BLACKMUN took no part in the consideration or decision of this case.

Mr. Justice WHITE, dissenting.

The declared purpose of the Indian Civil Rights Act of 1968 (ICRA or Act), 25 U.S.C. §§ 1301-1341, is "to insure that the American

Indian is afforded the broad constitutional rights secured to other Americans." S.Rep. No. 841, 90th

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Cong., 1st Sess., 6 (1967) (hereinafter Senate Report). The Court today, by denying a federal forum to Indians who allege that their rights under the ICRA have been denied by their tribes, substantially undermines the goal of the ICRA and in particular frustrates Title I's <sup>1</sup> purpose of "protect[ing] individual Indians from arbitrary and unjust actions of tribal governments." *Ibid.* Because I believe that implicit within Title I's declaration of constitutional rights is the authorization for an individual Indian to bring a civil action in federal court against tribal officials <sup>2</sup> for declaratory and injunctive relief to enforce those provisions, I dissent.

Under 28 U.S.C. § 1343(4), federal district courts have jurisdiction over "any civil action authorized by law to be commenced by any person . . . [t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." Because the ICRA is unquestionably a federal Act "providing for the protection of civil rights," the necessary inquiry is whether the Act authorizes the commencement of a civil action for such relief.

The Court noted in *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 777, 90 L.Ed. 939 (1946) (footnote omitted), that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." The fact that a statute is merely declarative and does not expressly provide for a cause of action to enforce its terms "does not, of course, prevent a federal court from fashioning an effective equitable remedy,"

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*Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 414 n. 13, 88 S.Ct. 2186, 2190, 20 L.Ed.2d 1189 (1968), for "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239, 90 S.Ct. 400, 405, 24 L.Ed.2d 386 (1969). We have previously identified the factors that are relevant in determining whether a private remedy is implicit in a statute not expressly providing one: whether the plaintiff is one of the class for whose especial benefit the statute was enacted; whether there is any indication of legislative intent either to create a remedy or to deny one; whether such a remedy is consistent with the underlying purposes of the statute; and whether the cause of action is one traditionally relegated to state law. *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2087, 45 L.Ed.2d 26 (1975). Application of these factors in the present context indicates that a private cause of action under Title I of the ICRA should be inferred.

As the majority readily concedes, "respondents, American Indians living on the Santa Clara reservation, are among the class for whose especial benefit this legislation was enacted." *Ante*, at 61. In spite of this recognition of the congressional intent to provide these particular respondents with the guarantee of equal protection of the laws, the Court denies them access to the federal courts to enforce this right because it concludes that Congress intended habeas corpus to be the exclusive remedy under Title I. My reading of the statute and the legislative history convinces me that Congress did not intend to deny a private cause of action to enforce the rights granted under § 1302.

The ICRA itself gives no indication that the constitutional rights it extends to American Indians are to be enforced only by means of federal habeas corpus actions. On the contrary, since several of the specified rights are most frequently invoked in noncustodial situations,<sup>3</sup> the natural assumption is

that some remedy other than habeas corpus must be contemplated. This assumption is not dispelled by the fact that the Congress chose to enumerate specifically the rights granted under § 1302, rather than to state broadly, as was originally proposed, that "any Indian tribe in exercising its powers of local self-government shall be subject to the same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution." S. 961, 89th Cong., 1st Sess. (1965). The legislative history reflects that the decision "to indicate in more specific terms the constitutional protections the American Indian possesses in relation to his tribe," was made in recognition of the "peculiarities of the Indian's economic and social condition, his customs, his beliefs, and his attitudes . . . ." Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Constitutional Rights of the American Indian: Summary Report of Hearings and Investigations pursuant to S.Res.194, 89th Cong., 2d Sess., 25, 9 (Comm. Print 1966) (hereinafter Summary Report). While I believe that the uniqueness of the Indian culture must be taken into consideration in applying the constitutional rights granted in § 1302, I do not think that it requires insulation of official tribal actions from federal-court scrutiny. Nor do I find any indication that Congress so intended.

The inferences that the majority draws from various changes Congress made in the originally proposed legislation are to my mind unsupported by the legislative history. The first change the Court points to is the substitution of a habeas corpus provision for S. 962's provision of *de novo* federal-court review of tribal criminal proceedings. See *ante*, at 67. This change, restricted in its concern to the criminal context, is of limited relevance to the question whether Congress intended a private cause of action to enforce rights arising in a civil context. Moreover, the

reasons this change was made are not inconsistent with the recognition of such a cause of action.

The Summary Report explains that the change in S. 962 was made only because of displeasure with the *degree* of intrusion permitted by the original provision:

"No one appearing before the subcommittee or submitting testimony for the subcommittee's consideration opposed the provision of some type of appeal from the decisions of tribal courts. Criticism of S. 962, however, was directed at the bill's use of a trial *de novo* in a U.S. district court as the appropriate means of securing appellate review. . . .

\* \* \* \* \*

"There was considerable support for the suggestion that the district court, instead of reviewing tribal court decisions on a *de novo* basis, be authorized only to decide *whether* the accused was deprived of a constitutional right. If no deprivation were found, the tribal court decision would stand. If, on the other hand, the district court determined that an accused had suffered a denial of his rights at the hands of the tribal court, the case would be remanded with instructions for dismissal or retrial, as the district court might decide." Summary Report 12-13 (footnote omitted).

The degree of intrusion permitted by a private cause of action to enforce the civil provisions of § 1302 would be no greater than that permitted in a habeas corpus proceeding. The federal district court's duty would be limited to determining whether the challenged tribal action violated one of the enumerated rights. If found to be in violation, the action would be invalidated; if not, it would be allowed to stand. In no event would the court be authorized, as in a *de novo*

review proceeding, to substitute its judgment concerning the wisdom of the action taken for that of the tribal authorities.

Nor am I persuaded that Congress, by rejecting various proposals for administrative review of alleged violations of Indian

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rights, indicated its rejection of federal *judicial* review of such violations. As the majority notes, the original version of the Act provided for investigation by the Attorney General of "any written complaint filed with him by any Indian . . . alleging that such Indian has been deprived of a right conferred upon citizens of the United States by the laws and Constitution of the United States." S. 963, 89th Cong., 1st Sess. (1965). The bill would have authorized the Attorney General to bring whatever action he deemed appropriate to vindicate such right. Although it is true that this provision was eliminated from the final version of the ICRA, the inference the majority seeks to draw from this fact is unwarranted.

It should first be noted that the focus of S. 963 was in large part aimed at nontribal deprivations of Indian rights. In explaining the need for the bill, the Subcommittee stated that it had received complaints of deprivations of Indians' constitutional rights in the following contexts, only two of which concern tribal actions: "[I]llegal detention of reservation Indians by State and tribal officials; arbitrary decisionmaking by the Bureau of Indian Affairs; denial of various State welfare services to Indians living off the reservations; discrimination by government officials in health services; mistreatment and brutality against Indians by State and tribal law enforcement officers; and job discrimination by Federal and State agencies and private businesses." Hearings on S. 961-968 and S.J.Res. 40 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st

Sess., 8 (1965) (hereinafter 1965 Hearings). See also *id.*, at 86 (testimony of Arthur Lazarus, Jr., General Counsel for the Association on American Indian Affairs, Inc.: "It is my understanding . . . that the complaints to be filed with the Attorney General are generally to be off-reservation violations of rights along the lines of the provisions in the Civil Rights Act"). Given this difference in focus, the elimination of this proposal has little relevance to the issue before us.

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Furthermore, the reasons for the proposal's deletion are not as clear as the majority seems to indicate. While two witnesses did express their fears that the proposal would disrupt tribal governments, many others expressed the view that the proposals gave the Attorney General no more authority than he already possessed. *Id.*, at 92, 104, 227, 319. The Acting Secretary of the Interior was among those who thought that this additional authorization was not needed by the Attorney General because the Department of the Interior already routinely referred complaints of Indian rights violations to him for the commencement of appropriate litigation. *Id.*, at 319.

The failure of Congress to adopt the Department of the Interior's substitute provision provides even less support for the view that Congress opposed a private cause of action. This proposal would have allowed the Secretary of the Interior to review "[a]ny action, other than a criminal action, taken by an Indian tribal government which deprives any American Indian of a right or freedom established and protected by this Act . . ." and to take "such corrective action" as he deemed necessary. *Id.*, at 318. It was proposed in tandem with a provision that would have allowed an Indian to appeal from a criminal conviction in a tribal court to the Secretary, who would then have been authorized to affirm, modify, or reverse the tribal court's

decision. Most of the discussion about this joint proposal focused on the review of criminal proceedings, and several witnesses expressed objection to it because it improperly "mixed" "the judicial process . . . with the executive process." *Id.*, at 96. See also *id.*, at 294. Senator Ervin himself stated that he had difficulty reconciling [his] ideas of the nature of the judicial process and the notion of taking an appeal in what is supposed to be a judicial proceeding to the executive branch of the Government." *Id.*, at 225. While the discussion of the civil part of the proposal was limited, it may be assumed that Congress was equally unreceptive to the

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idea of the Executive Branch's taking "corrective actions" with regard to noncriminal actions of tribal governments.

In sum, then, I find no positive indication in the legislative history that Congress opposed a private cause of action to enforce the rights extended to Indians under § 1302.<sup>4</sup> The absence of any express approval of such a cause of action, of course, does not prohibit its inference, for, as we stated in *Cort* : "[I]n situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such cause of action would be controlling." 422 U.S., at 82, 95 S.Ct., at 2090 (footnote omitted).

The most important consideration, of course, is whether a private cause of action would be consistent with the underlying-

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ing purposes of the Act. As noted at the outset, the Senate Report states that the purpose of the ICRA "is to insure that the American Indian is afforded the broad constitutional rights secured to other

Americans." Senate Report 6. Not only is a private cause of action consistent with that purpose, it is necessary for its achievement. The legislative history indicates that Congress was concerned, not only about the Indian's lack of substantive rights, but also about the lack of remedies to enforce whatever rights the Indian might have. During its consideration of this legislation, the Senate Subcommittee pointed out that "[t]hough protected against abridgment of his rights by State or Federal action, the individual Indian is . . . without redress against his tribal authorities." Summary Report 3. It is clear that the Subcommittee's concern was not limited to the criminal context, for it explained:

"It is not only in the operation of tribal courts that Indians enjoy something other than full benefit of the Bill of rights. For example, a Navajo tribal council ordinance prohibiting the use of peyote resulted in an alleged abridgment of religious freedom when applied to members of the Native American Church, an Indian sect which uses the cactus plant in connection with its worship services.

"The opinion of the U.S. Court of Appeals for the 10th Circuit, in dismissing an action of the Native American Church against the Navajo tribal council, is instructive in pointing up the lack of remedies available to the Indian in resolving his differences with tribal officials." *Id.*, at 3-4 (footnotes omitted).<sup>5</sup>

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It was "[t]o remedy these various situations and thereby to safeguard the rights of Indian citizens . . ." that the legislation resulting in the ICRA was proposed. *Id.*, at 5.

Several witnesses appearing before the Senate Subcommittee testified concerning deprivations of their rights by tribal authorities and their inability to gain relief. Mr. Frank Takes Gun, President of the Native

American Church, for example, stated that "the Indian is without an effective means to enforce whatever constitutional rights he may have in tribal proceedings instituted to deprive him of liberty or property. While I suppose that abstractedly [*sic*] we might be said to enjoy [certain] rights . . . , the blunt fact is that unless the tribal court elects to confer that right upon us we have no way of securing it." 1965 Hearings 164. Miss Emily Schuler, who accompanied a former Governor of the Isleta Pueblo to the hearings, echoed these concerns. She complained that "[t]he people get governors and sometimes they get power hungry and then the people have no rights at all," to which Senator Ervin responded: "'Power hungry' is a pretty good shorthand statement to show why the people of the United States drew up a Constitution. They wanted to compel their rulers to

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stay within the bounds of that Constitution and not let that hunger for power carry them outside it." *Id.*, at 264.

Given Congress' concern about the deprivations of Indian rights by tribal authorities, I cannot believe, as does the majority, that it desired the enforcement of these rights to be left up to the very tribal authorities alleged to have violated them. In the case of the Santa Clara Pueblo, for example, both legislative and judicial powers are vested in the same body, the Pueblo Council. See App. 3-5. To suggest that this tribal body is the "appropriate" forum for the adjudication of alleged violations of the ICRA is to ignore both reality and Congress' desire to provide a means of redress to Indians aggrieved by their tribal leaders.<sup>6</sup>

Although the Senate Report's statement of the purpose of the ICRA refers only to the granting of constitutional rights to the Indians. I agree with the majority that the legislative history demonstrates that Congress was also concerned with furthering Indian

self-government. I do not agree, however, that this concern on the part of congress precludes our recognition of a federal cause of action to enforce the terms of the Act. The major intrusion upon the tribe's right to govern itself occurred when Congress enacted the ICRA and man-

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dated that the tribe "in exercising powers of self-government" observe the rights enumerated in § 1302. The extension of constitutional rights to individual citizens is *intended* to intrude upon the authority of government. And once it has been decided that an individual does possess certain rights vis-a-vis his government, it necessarily follows that he has some way to enforce those rights. Although creating a federal cause of action may "constitut[e] an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself," *ante*, at 59, in my mind it is a further step that must be taken; otherwise, the change in the law may be meaningless.

The final consideration suggested in *Cort* is the appropriateness of a federal forum to vindicate the right in question. As even the majority acknowledges, "we have frequently recognized the propriety of inferring a federal cause of action for the enforcement of civil rights . . . ." *Ante*, at 61. For the reasons set out above, I would make no exception here.

Because I believe that respondents stated a cause of action over which the federal courts have jurisdiction, I would proceed to the merits of their claim. Accordingly, I dissent from the opinion of the Court.

\* Mr. Justice REHNQUIST joins Parts I, II, IV, and V of this opinion.

1. The ICRA was initially passed by the Senate in 1967, 113 Cong.Rec. 35473, as a separate bill containing six Titles. S. 1843, 90th Cong., 1st Sess. (1967). It was re-enacted by the

Senate in 1968 without change, 114 Cong.Rec. 5838, as an amendment to a House-originated bill, H.R. 2516, 90th Cong., 2d Sess. (1968), and was then approved by the House and signed into law by the President as Titles II through VII of the Civil Rights Act of 1968, Pub.L. 90-284, 82 Stat. 77. Thus, the first Title of the ICRA was enacted as Title II of the Civil Rights Act of 1968. The six Titles of the ICRA will be referred to herein by their title numbers as they appeared in the version of S. 1843 passed by the Senate in 1967.

2. The ordinance, enacted by the Santa Clara Pueblo Council pursuant to its legislative authority under the Constitution of the Pueblo, establishes the following membership rules:

"1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.

"2. . . . [C]hildren born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.

"3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.

"4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances."

Respondents challenged only subparagraphs 2 and 3. By virtue of subparagraph 4, Julia Martinez' husband is precluded from joining the Pueblo and thereby assuring the children's membership pursuant to subparagraph 1.

3. Respondent Julia Martinez was certified to represent a class consisting of all women who are members of the Santa Clara Pueblo and have married men who are not members of

the Pueblo, while Audrey Martinez was certified as the class representative of all children born to marriages between Santa Clara women and men who are not members of the Pueblo.

4. Section 1343(4) gives the district courts "jurisdiction of any civil action *authorized by law* to be commenced by any person . . . to secure equitable or other relief under any Act of Congress providing for the protection of civil rights" (emphasis added). The District Court evidently believed that jurisdiction could not exist under § 1343(4) unless the ICRA did in fact authorize actions for declaratory or injunctive relief in appropriate cases. For purposes of this case, we need not decide whether § 1343(4) jurisdiction can be established merely by presenting a *substantial question* concerning the availability of a particular form of relief. Cf. *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946) (jurisdiction under 28 U.S.C. § 1331). See also *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 67-68, 53 S.Ct. 278, 280, 77 L.Ed. 619 (1933) (Cardozo, J.).

5. The court found that "Audrey Martinez and many other children similarly situated have been brought up on the Pueblo, speak the Tewa language, participate in its life, and are, culturally, for all practical purposes, Santa Clara Indians." 402 F.Supp., at 18.

6. The Santa Clara Pueblo is a relatively small tribe. Approximately 1,200 members reside on the reservation; 150 members of the Pueblo live elsewhere. In addition to tribal members, 150-200 nonmembers live on the reservation.

7. See, e. g., *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 533 (CA8 1967) (Due Process Clause of Fourteenth Amendment); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (CA10 1959) (freedom of religion

under First and Fourteenth Amendments); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (CA8 1958), cert. denied, 358 U.S. 932, 79 S.Ct. 320, 3 L.Ed.2d 304 (1959) (Fourteenth Amendment). See also *Martinez v. Southern Ute Tribe*, 249 F.2d 915, 919 (CA10 1957), cert. denied, 356 U.S. 960, 78 S.Ct. 998, 2 L.Ed.2d 1067 (1958) (applying *Talton* to Fifth Amendment due process claim); *Groundhog v. Keeler*, 442 F.2d 674, 678 (CA10 1971). But see *Colliflower v. Garland*, 342 F.2d 369 (CA9 1965), and *Settler v. Yakima Tribal Court*, 419 F.2d 486 (CA9 1969), cert. denied, 398 U.S. 903, 90 S.Ct. 1690, 26 L.Ed.2d 61 (1970), both holding that where a tribal court was so pervasively regulated by a federal agency that it was in effect a federal instrumentality, a writ of habeas corpus would lie to a person detained by that court in violation of the Constitution.

The line of authority growing out of *Talton*, while exempting Indian tribes from constitutional provisions addressed specifically to State or Federal Governments, of course, does not relieve State and Federal Governments of their obligations to individual Indians under these provisions.

<sup>8</sup> Section 1302 in its entirety provides that:

"No Indian tribe in exercising powers of self-government shall—

"(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

"(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

"(3) subject any person for the same offense to be twice put in jeopardy;

"(4) compel any person in any criminal case to be a witness against himself;

"(5) take any private property for a public use without just compensation;

"(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

"(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of \$500, or both;

"(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

"(9) pass any bill of attainder or ex post facto law; or

"(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons."

Section 1301 is a definitional section, which provides, *inter alia*, that the "powers of self-government" shall include "all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed . . . ." 25 U.S.C. § 1301(2).

<sup>9</sup>. In *Fisher*, we held that a state court did not have jurisdiction over an adoption proceeding in which all parties were members of an Indian tribe and residents of the reservation. Rejecting the mother's argument that denying her access to the state courts constituted an impermissible racial discrimination, we reasoned:

"The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law . . . . [E]ven if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government." 424 U.S., at 390-391, 96 S.Ct., at 948.

In *Williams v. Lee*, we held that a non-Indian merchant could not invoke the jurisdiction of a state court to collect a debt owed by a reservation Indian and arising out of the merchant's activities on the reservation, but instead must seek relief exclusively through tribal remedies.

<sup>10</sup>. "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39, [36 S.Ct. 482, 60 L.Ed. 874] (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, e. g., *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458, 460, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, e. g., *Amtrak, supra*; *Securities Investor Protection Corp. v.*

*Barbour*, 421 U.S. 512, 423, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975); *Calhoon v. Harvey*, 379 U.S. 134, 85 S.Ct. 292, 13 L.Ed.2d 190 (1964). And finally, is the cause of action one traditionally relegated to state [or tribal] law, in an area basically the concern of the States [or tribes], so that it would be inappropriate to infer a cause of action based solely on federal law?" *Cort v. Ash*, 422 U.S., at 78, 95 S.Ct., at 2088.

See generally Note, Implication of Civil Remedies Under the Indian Civil Rights Act, 75 Mich.L.Rev. 210 (1976).

<sup>11</sup>. One month before passage of the ICRA, President Johnson had urged its enactment as part of a legislative and administrative program with the overall goal of furthering "self-determination," "self-help," and "self-development" of Indian tribes. See 114 Cong.Rec. 5518, 5520 (1968).

<sup>12</sup>. Exploratory hearings which led to the ICRA commenced in 1961 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee. In 1964, Senator Ervin, Chairman of the Subcommittee, introduced S. 3041-3048, 88th Cong., 2d Sess., on which no hearings were had. The bills were reintroduced in the 89th Congress as S. 961-968 and were the subject of extensive hearings by the Subcommittee. Hearings on S. 961-968 and S.J.Res. 40 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965) (hereinafter cited as 1965 Hearings).

S. 961 would have extended to tribal governments all constitutional provisions applicable to the Federal Government. After criticism of this proposal at the hearings, Congress instead adopted the approach found in a substitute bill submitted by the Interior Department, reprinted in 1965 Hearings 318, which, with some changes in wording, was

enacted into law as 25 U.S.C. §§ 1302-1303. See also n. 1, *supra*.

<sup>13</sup>. See, *e. g.*, Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Constitutional Rights of the American Indian: Summary Report of Hearings and Investigations Pursuant to S.Res. 194, 89th Cong., 2d Sess., 8-11, 25 (Comm. Print 1966); 1965 Hearings 17, 21, 50 (statements of Solicitor of the Dept. of Interior); *id.*, at 65 (statement of Arthur Lazarus, Jr., General Counsel for the Association of American Indian Affairs).

<sup>14</sup>. The provisions of § 1302, set forth fully in n. 8, *supra*, differ in language and in substance in many other respects from those contained in the constitutional provisions on which they were modeled. The provisions of the Second and Third Amendments, in addition to those of the Seventh Amendment, were omitted entirely. The provision here at issue, § 1302(8), differs from the constitutional Equal Protection Clause in that it guarantees "the equal protection of *its* [the tribe's] laws," rather than of "*the* laws." Moreover, § 1302(7), which prohibits cruel or unusual punishments and excessive bails, sets an absolute limit of six months' imprisonment and a \$500 fine on penalties which a tribe may impose. Finally, while most of the guarantees of the Fifth Amendment were extended to tribal actions, it is interesting to note that § 1302 does not require tribal criminal prosecutions to be initiated by grand jury indictment, which was the requirement of the Fifth Amendment specifically at issue and found inapplicable to tribes in *Talton v. Mayes*, discussed, *supra*, at 56.

<sup>15</sup>. See, *e. g.*, 114 Cong.Rec. 9596 (1968) (remarks of Rep. Meeds); Hearings on H.R. 15419 before the Subcommittee on Indian Affairs of the House Committee on Interior & Insular Affairs, 90th Cong., 2d Sess., 108 (1968) (hereinafter cited as House Hearings).

See also 1965 Hearings 198 (remarks of Executive Director, National Congress of American Indians).

<sup>16</sup>. In 25 U.S.C. § 1323(b), Congress expressly repealed § 7 of the Act of Aug. 15, 1953, 67 Stat. 590, which had authorized States to assume criminal and civil jurisdiction over reservations without tribal consent.

<sup>17</sup>. Title II of the ICRA provides, *inter alia*, "for the establishing of educational classes for the training of judges of courts of Indian offenses." 25 U.S.C. § 1311(4). Courts of Indian offenses were created by the Federal Bureau of Indian Affairs to administer criminal justice for those tribes lacking their own criminal courts. See generally W. Hagan, *Indian Police and Judges* 104-125 (1966).

<sup>18</sup>. Under 25 U.S.C. § 81, the Secretary of the Interior and the Commissioner of Indian Affairs are generally required to approve any contract made between a tribe and an attorney. At the exploratory hearings, see n. 12, *supra*, it became apparent that the Interior Department had engaged in inordinate delays in approving such contracts and had thereby hindered the tribes in defending and asserting their legal rights. See, *e. g.*, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary pursuant to S.Res.53, 87th Cong., 1st Sess., 211 (1961) (hereinafter cited as 1961 Hearings); *id.*, at 290, 341, 410. Title V of the ICRA, 25 U.S.C. § 1331, provides that the Department must act on applications for approval of attorney contracts within 90 days of their submission or the application will be deemed to have been granted.

<sup>19</sup>. The cost of civil litigation in federal district courts, in many instances located far from the reservations, doubtless exceeds that in most tribal forums. See generally 1 American Indian Policy Review Commission, *Final Report* 160-166 (1977); M. Price, *Law and the*

American Indian 154-160 (1973). And as became apparent in congressional hearings on the ICRA, many of the poorer tribes with limited resources and income could ill afford to shoulder the burdens of defending federal lawsuits. See, *e. g.*, 1965 Hearings 131, 157; Summary Report 1679; House Hearings 69 (remarks of the Governor of the San Felipe Pueblo).

<sup>20</sup>. Prior to passage of the ICRA, Congress made detailed inquiries into the extent to which tribal constitutions incorporated "Bill of Rights" guarantees, and the degree to which the tribal provisions differed from those found in the Constitution. See, *e. g.*, 1961 Hearings 121, 166, 359; Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary pursuant to S.Res.58, 88th Cong., 1st Sess., 823 (1963). Both Senator Ervin, the ICRA's chief sponsor, and President Johnson, in urging passage of the Act, explained the need for Title I on the ground that few tribal constitutions included provisions of the Bill of Rights. See House Hearings 131 (remarks of Sen. Ervin); 114 Cong.Rec. 5520 (1968) (message from the President).

<sup>21</sup>. There are 287 tribal governments in operation in the United States, of which 117 had operating tribal courts in 1976. 1 American Indian Policy Review Commission, *supra*, n. 19, at 5, 163. In 1973 these courts handled approximately 70,000 cases. *Id.*, at 163-164. Judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts. See, *e. g.*, *United States ex rel. Mackey v. Coxe*, 18 How. 100, 15 L.Ed. 299 (1856); *Standley v. Roberts*, 59 F. 836, 845 (CA8 1894), appeal dismissed, 17 S.Ct. 999, 41 L.Ed. 1177 (1896).

<sup>22</sup>. By the terms of its Constitution, adopted in 1935 and approved by the Secretary of the Interior in accordance with the Indian

Reorganization Act of 1934, 25 U.S.C. § 476, judicial authority in the Santa Clara Pueblo is vested in its tribal council.

Many tribal constitutions adopted pursuant to 25 U.S.C. § 476, though not that of the Santa Clara Pueblo, include provisions requiring that tribal ordinances not be given effect until the Department of Interior gives its approval. See 1 American Indian Policy Review Commission, *supra* n. 19, at 187-188; 1961 Hearings 95. In these instances, persons aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department of the Interior.

<sup>23</sup>. See n. 12, *supra*. Although extensive hearings on the ICRA were held in the Senate, see *ibid.*, House consideration was extremely abbreviated. See House Hearings, *supra*; 114 Cong.Rec. 9614-9615 (1968) (remarks of Rep. Aspinall).

<sup>24</sup>. S. 962, 89th Cong., 1st Sess. (1965), reprinted in 1965 Hearings 6-7. See n. 12, *supra*.

<sup>25</sup>. S. 963, 89th Cong., 1st Sess. (1965). See n. 12, *supra*.

<sup>26</sup>. The Interior Department substitute, reprinted in 1965 Hearings 318, provided in relevant part:

"Any action, other than a criminal action, taken by an Indian tribal government which deprives any American Indian of a right or freedom established and protected by this Act may be reviewed by the Secretary of the Interior upon his own motion or upon the request of said Indian. If the Secretary determines that said Indian has been deprived of any such right or freedom, he shall require the Indian tribal government to take such corrective action as he deems necessary. Any final decision of the Secretary may be reviewed by the United States district court in the district in which the action arose

and such court shall have jurisdiction thereof."

In urging Congress to adopt this proposal, the Solicitor of Interior specifically suggested that "Congress has the power to give to the courts the jurisdiction that they would require to review the actions of an Indian tribal court," and that the substitute bill which the Department proposed "would actually confer on the district courts the jurisdiction they require to consider these problems." *Id.*, 23-24. Congress' failure to adopt this provision is noteworthy particularly because it did adopt the other portion of the Interior substitute bill, which led to the current version of §§ 1302 and 1303. See n. 12, *supra*.

27. Respondents rely most heavily on a rambling passage in the Report discussing *Talton v. Mayes* and its progeny, see n. 7, *supra*, some of which arose in a civil context. S.Rep. No. 841, at 8-11. Although there is some language suggesting that Congress was concerned about the unavailability of relief in federal court, the Report nowhere states that Title I would be enforceable in a cause of action for declaratory or injunctive relief, and the cited passage is fully consistent with the conclusion that Congress intended only to modify the substance of the law applicable to Indian tribes, and to allow enforcement in federal court through habeas corpus. The Report itself characterized the import of its discussion as follows:

"These cases illustrate the continued denial of specific constitutional guarantees to litigants in tribal court proceedings, on the ground that the tribal courts are quasi-sovereign entities to which general provisions in the Constitution do not apply." *Id.*, at 10.

28. The Report states: "The purpose of title I is to protect individual Indians from arbitrary and unjust actions by tribal governments. This is accomplished by placing certain limitations on an Indian tribe in the exercise

of its powers of self-government." *Id.* at 6. It explains further that "[i]t is hoped that title II [25 U.S.C. § 1311], requiring the Secretary of the Interior to recommend a model code [to govern the administration of justice] for all Indian tribes, will implement the effect of title I." *Ibid.* (Although § 1311 by its terms refers only to courts of Indian offenses, see n. 17, *supra*, the Senate Report makes clear that the code is intended to serve as a model for use in all tribal courts. S.Rep. No. 841, *supra*, at 6, 11.) Thus, it appears that the Committee viewed § 1302 as enforceable only on habeas corpus and in tribal forums.

29. Senator Ervin described the model code provisions of Title II, see n. 28, *supra*, as "the proper vehicle by which the objectives" of Title I should be achieved. 113 Cong.Rec. 13475 (1967). And Congressman Reifel, one of the ICRA's chief supporters in the House, explained that "by providing for a writ of habeas corpus from the Federal court, the bill would assure effective enforcement of these fundamental rights." 114 Cong.Rec. 9553 (1968).

30. Only a few tribes had an opportunity to comment on the ICRA in its final form, since the House held only one day of hearings on the legislation. See n. 23, *supra*. The Pueblos of New Mexico, testifying in opposition to the provisions of Title I, argued that the habeas corpus provision of § 1303 "opens an avenue through which Federal courts, lacking knowledge of our traditional values, customs, and laws, could review and offset the decisions of our tribal councils." House Hearings 37. It is inconceivable that, had they understood the bill impliedly to authorize other actions, they would have remained silent, as they did, concerning this possibility. It would hardly be consistent with "[t]he overriding duty of our Federal Government to deal fairly with Indians," *Morton v. Ruiz*, 415 U.S. 199, 236, 94 S.Ct. 1055, 1075, 39 L.Ed.2d 270 (1974), lightly to imply a cause of action

on which the tribes had no prior opportunity to present their views.

31. See generally Burnett, An Historical Analysis of the 1968 "Indian Civil Rights" Act, 9 Harv.J.Legis. 557, 574-602, 603 (1972).

32. A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. See *Roff v. Burney*, 168 U.S. 218, 18 S.Ct. 60, 42 L.Ed. 442 (1897); *Cherokee Intermarriage Cases*, 203 U.S. 76, 27 S.Ct. 29, 51 L.Ed. 96 (1906). Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.

1. 25 U.S.C. §§ 1301-1303.

2. Because the ICRA is silent on the question, I agree with the Court that the Act does not constitute a waiver of the Pueblo's sovereign immunity. The relief respondents seek, however, is available against petitioner Lucario Padilla, the Governor of the Pueblo. Under the Santa Clara Constitution, the Governor is charged with the duty of enforcing the Pueblo's laws. App. 5.

3. For example, habeas corpus relief is unlikely to be available to redress violations of freedom of speech, freedom of the press, free exercise of religion, or just compensation for the taking of property.

4. References in the legislative history to the role of Title II's model code in effectuating the purposes of Title I do not indicate that Congress rejected the possibility of a federal cause of action under § 1302. The wording of § 1311, which directs the Secretary of the Interior to recommend a model code, demonstrates that in enacting Title II Congress was primarily concerned with

criminal proceedings. Thus it requires the code to include

"provisions which will (1) assure that any individual being tried for an offense by a court of Indian offenses shall have the same rights, privileges, and immunities under the United States Constitution as would be guaranteed any citizen of the United States being tried in a Federal court for any similar offense, (2) assure that any individual being tried for an offense by a court of Indian offenses will be advised and made aware of his rights under the United States Constitution, and under any tribal constitution applicable to such individual . . . ."

The remaining required provisions concern the qualifications for office of judges of courts of Indian offenses and educational classes for the training of such judges. While the enactment of Title II shows Congress' desire to implement the provisions of § 1302 concerning rights of criminal defendants and to upgrade the quality of tribal judicial proceedings, it gives no indication that Congress decided to deny a federal cause of action to review tribal actions arising in a noncriminal context.

5. The opinion to which the Subcommittee was referring was *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (CA10 1959), in which the court dismissed for lack of federal jurisdiction an action challenging a Navajo tribal ordinance making it a criminal offense "to introduce into the Navajo country, sell, use or have in possession within the Navajo country, the bean known as peyote . . . ." *Id.*, at 132. It was contended that the ordinance violated plaintiffs' right to the free exercise of religion. Because the court concluded that the First Amendment was not applicable to the tribe, it held that the federal courts lacked jurisdiction, "even though [the tribal laws or regulations] may have an

impact to some extent on forms of religious worship." *Id.*, at 135.

The Senate Report also made note of this decision in what the majority terms a "rambling passage." *Ante*, at 69 n. 27. In this passage the Committee reviewed various federal decisions relating to the question "whether a tribal Indian can successfully challenge on constitutional grounds specific acts or practices of the Indian tribe." Senate Report 9. With only one exception, these decisions held that federal courts lacked jurisdiction to review alleged constitutional violations by tribal officials because the provisions of the Bill of Rights were not binding on the tribes. This section of the Senate Report, which is included under the heading "Need for Legislation," indicates Congress' concern over the Indian's lack of remedies for tribal constitutional violations.

6. Testimony before the Subcommittee indicated that the mere provision of constitutional rights to the tribes did not necessarily guarantee that those rights would be observed. Mr. Lawrence Jaramillo, a former Governor of the Isleta Pueblo, testified that, despite the tribal constitution's guarantee of freedom of religion, the present tribal Governor had attempted to "alter certain religious procedures of the Catholic priest who resides on the reservation." 1965 Hearings 261, 264. Mr. Jaramillo stated that the Governor "has been making his own laws and he has been making his own decisions and he has been making his own court rulings," and he implored the Subcommittee:

"Honorable Senator Ervin, we ask you to see if we can have any protection on these constitutional rights. We do not want to give jurisdiction to the State. We want to keep it in Federal jurisdiction. But we are asking this. We know if we are not given justice that we would like to appeal a case to the Federal court." *Id.*, at 264.

**490 U.S. 30**  
**109 S.Ct. 1597**  
**104 L.Ed.2d 29**  
**MISSISSIPPI BAND OF CHOCTAW**  
**INDIANS, Appellant**

**v.**

**Orrey Curtiss HOLYFIELD, et ux., J.B.,**  
**Natural Mother and W.J., Natural**  
**Father.**

**No. 87-980.**

Argued Jan. 11, 1989.

Decided April 3, 1989.

*Syllabus*

On the basis of extensive evidence indicating that large numbers of Indian children were being separated from their families and tribes and were being placed in non-Indian homes through state adoption, foster care, and parental rights termination proceedings, and that this practice caused serious problems for the children, their parents, and their tribes, Congress enacted the Indian Child Welfare Act of 1978 (ICWA), which, *inter alia*, gives tribal courts exclusive jurisdiction over custody proceedings involving an Indian child "who resides or is domiciled within" a tribe's reservation. This case involves the status of twin illegitimate babies, whose parents were enrolled members of appellant Tribe and residents and domiciliaries of its reservation in Neshoba County, Mississippi. After the twins' births in Harrison County, some 200 miles from the reservation, and their parents' execution of consent-to-adoption forms, they were adopted in that county's Chancery Court by the appellees Holyfield, who were non-Indian. That court subsequently overruled appellant's motion to vacate the adoption decree, which was based on the assertion that under the ICWA exclusive jurisdiction was vested in appellant's tribal court. The Supreme Court of Mississippi affirmed, holding, among other things, that the twins were not "domiciled" on the reservation

under state law, in light of the Chancery Court's findings (1) that they had never been physically present there, and (2) that they were "voluntarily surrendered" by their parents, who went to some efforts to see that they were born outside the reservation and promptly arranged for their adoption. Therefore, the court said, the twins' domicile was in Harrison County, and the Chancery Court properly exercised jurisdiction over the adoption proceedings.

*Held:* The twins were "domiciled" on the Tribe's reservation within the meaning of the ICWA's exclusive tribal jurisdiction provision, and the Chancery Court was, accordingly, without jurisdiction to enter the adoption decree. Pp. 42-54.

(a) Although the ICWA does not define "domicile," Congress clearly intended a uniform federal law of domicile for the ICWA and did not consider the definition of the word to be a matter of state law. The ICWA's purpose was, in part, to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings. In fact,

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the statutory congressional findings demonstrate that Congress perceived the States and their courts as partly responsible for the child separation problem it intended to correct. Thus, it is most improbable that Congress would have intended to make the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law. Moreover, Congress could hardly have intended the lack of nationwide uniformity that would result from state-law definitions of "domicile," whereby different rules could apply from time to time to the same Indian child, simply as a result of his or her being moved across state lines. Pp. 43-47.

(b) The generally accepted meaning of the term "domicile" applies under the ICWA to the extent it is not inconsistent with the objectives of the statute. In the absence of a statutory definition, it is generally assumed that the legislative purpose is expressed by the ordinary meaning of the words used, in light of the statute's object and policy. Well-settled common-law principles provide that the domicile of minors, who generally are legally incapable of forming the requisite intent to establish a domicile, is determined by that of their parents, which has traditionally meant the domicile of the mother in the case of illegitimate children. Thus, since the domicile of the twins' mother (as well as their father) has been, at all relevant times, on appellant's reservation, the twins were also domiciled there even though they have never been there. This result is not altered by the fact that they were "voluntarily surrendered" for adoption. Congress enacted the ICWA because of concerns going beyond the wishes of individual parents, finding that the removal of Indian children from their cultural setting seriously impacts on long-term tribal survival and has a damaging social and psychological impact on many individual Indian children. These concerns demonstrate that Congress could not have intended to enact a rule of domicile that would permit individual Indian parents to defeat the ICWA's jurisdictional scheme simply by giving birth and placing the child for adoption off the reservation. Pp. 47-53.

511 So.2d 918 (Miss.1987), reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed a dissenting opinion, in which REHNQUIST, C.J., and KENNEDY, J., joined, *post*, p. 54.

Edwin R. Smith, Meridian, Miss., for appellant.

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Edward O. Miller, Gulfport, Miss., for appellees.

Justice BRENNAN delivered the opinion of the Court.

This appeal requires us to construe the provisions of the Indian Child Welfare Act that establish exclusive tribal jurisdiction over child custody proceedings involving Indian children domiciled on the tribe's reservation.

I  
A.

The Indian Child Welfare Act of 1978 (ICWA), 92 Stat. 3069, 25 U.S.C. §§ 1901-1963, was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes. Senate oversight hearings in 1974 yielded numerous examples, statistical data, and expert testimony documenting what one witness called "[t]he wholesale removal of Indian children from their homes, . . . the most tragic aspect of Indian life today." Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess., 3 (statement of William Byler) (hereinafter 1974 Hearings). Studies undertaken by the Association on American Indian Affairs in 1969 and 1974, and presented in the Senate hearings, showed that 25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions. *Id.*,

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at 15; see also H.R.Rep. No. 95-1386, p. 9 (1978) (hereinafter House Report), U.S.Code Cong. & Admin.News 1978, pp. 7530, 7531. Adoptive placements counted significantly in this total: in the State of Minnesota, for example, one in eight Indian children under the age of 18 was in an adoptive home, and during the year 1971-1972 nearly one in every four infants under one year of age was placed for adoption. The adoption rate of Indian children was eight times that of non-Indian children. Approximately 90% of the Indian placements were in non-Indian homes. 1974 Hearings, at 75-83. A number of witnesses also testified to the serious adjustment problems encountered by such children during adolescence,<sup>1</sup> as well as the impact of the adoptions on Indian parents and the tribes themselves. See generally 1974 Hearings.

Further hearings, covering much the same ground, were held during 1977 and 1978 on the bill that became the

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ICWA.<sup>2</sup> While much of the testimony again focused on the harm to Indian parents and their children who were involuntarily separated by decisions of local welfare authorities, there was also considerable emphasis on the impact on the tribes themselves of the massive removal of their children. For example, Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen's Association, testified as follows:

"Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area

is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships." 1978 Hearings, at 193.

See also *id.*, at 62.<sup>3</sup> Chief Isaac also summarized succinctly what numerous witnesses saw as the principal reason for the high rates of removal of Indian children:

"One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life

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and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child." *Id.*, at 191-192.<sup>4</sup>

The congressional findings that were incorporated into the ICWA reflect these sentiments. The Congress found:

"(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . ;

"(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

"(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative

and judicial bodies, have often failed to recognize the essential tribal relations of Indian people

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and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901.

At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings. Section 1911 lays out a dual jurisdictional scheme. Section 1911(a) establishes exclusive jurisdiction in the tribal courts for proceedings concerning an Indian child "who resides or is domiciled within the reservation of such tribe," as well as for wards of tribal courts regardless of domicile.<sup>5</sup> Section 1911(b), on the other hand, creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation: on petition of either parent or the tribe, state-court proceedings for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of "good cause," objection by either parent, or declination of jurisdiction by the tribal court.

Various other provisions of ICWA Title I set procedural and substantive standards for those child custody proceedings that do take place in state court. The procedural safeguards include requirements concerning notice and appointment of counsel; parental and tribal rights of intervention and petition for invalidation of illegal proceedings; procedures governing voluntary consent to termination of parental rights; and a full faith and credit obligation in respect to tribal court decisions. See §§ 1901-1914. The most important substantive requirement imposed on state courts is that of § 1915(a), which, absent "good cause" to the contrary, man-

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dates that adoptive placements be made preferentially with (1) members of the child's extended family, (2) other members of the same tribe, or (3) other Indian families.

The ICWA thus, in the words of the House Report accompanying it, "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." House Report, at 23, U.S.Code Cong. & Admin.News 1978, at 7546. It does so by establishing "a Federal policy that, where possible, an Indian child should remain in the Indian community," *ibid.*, and by making sure that Indian child welfare determinations are not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family." *Id.*, at 24, U.S.Code Cong. & Admin.News 1978, at 7546.<sup>6</sup>

B

This case involves the status of twin babies, known for our purposes as B.B. and G.B., who were born out of wedlock on December 29, 1985. Their mother, J.B., and father, W.J., were both enrolled members of appellant Mississippi Band of Choctaw Indians (Tribe), and were residents and domiciliaries of the Choctaw Reservation in Neshoba County, Mississippi. J.B. gave birth to the twins in Gulfport, Harrison County, Mississippi, some 200 miles from the reservation. On January 10, 1986, J.B. executed a consent-to-adoption form before the Chancery Court of Harrison

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County. Record 8-10.<sup>7</sup> W.J. signed a similar form.<sup>8</sup> On January 16, appellees Orrey and Vivian Holyfield<sup>9</sup> filed a petition for adoption in the same court, *id.*, at 1-5, and the chancellor issued a Final Decree of Adoption on January 28. *Id.*, at 13-14.<sup>10</sup> Despite the court's apparent awareness of the ICWA,<sup>11</sup> the adoption decree contained no reference to it, nor to the infants' Indian background.

Two months later the Tribe moved in the Chancery Court to vacate the adoption decree on the ground that under the ICWA exclusive jurisdiction was vested in the tribal court. *Id.*, at 15-18.<sup>12</sup> On July 14, 1986, the court overruled the mo-

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tion, holding that the Tribe "never obtained exclusive jurisdiction over the children involved herein. . . ." The court's one-page opinion relied on two facts in reaching that conclusion. The court noted first that the twins' mother "went to some efforts to see that they were born outside the confines of the Choctaw Indian Reservation" and that the parents had promptly arranged for the adoption by the Holyfields. Second, the court stated: "At no time from the birth of these children to the present date have either of them resided on or physically been on the Choctaw Indian Reservation." *Id.*, at 78.

The Supreme Court of Mississippi affirmed. 511 So.2d 918 (1987). It rejected the Tribe's arguments that the state court lacked jurisdiction and that it, in any event, had not applied the standards laid out in the ICWA. The court recognized that the jurisdictional question turned on whether the twins were domiciled on the Choctaw Reservation. It answered that question as follows:

"At no point in time can it be said the twins resided on or were domiciled within the territory set aside for the reservation. Appellant's argument that living within the womb of their mother qualifies the children's residency on the reservation may be lauded for its creativity; however, apparently it is unsupported by any law within this state, and will not be addressed at this time due to the far-reaching legal ramifications that would occur were we to follow such a complicated tangential course." *Id.*, at 921.

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The court distinguished Mississippi cases that appeared to establish the principle that "the domicile of minor children follows that of the parents," *ibid.*; see *Boyle v. Griffin*, 84 Miss. 41, 36 So. 141 (1904); *Stubbs v. Stubbs*, 211 So.2d 821 (Miss.1968); see also *In re Guardianship of Watson*, 317 So.2d 30 (Miss.1975). It noted that "the Indian twins . . . were voluntarily surrendered and legally abandoned by the natural parents to the adoptive parents, and it is undisputed that the parents went to some efforts to prevent the children from being placed on the reservation as the mother arranged for their birth and adoption in Gulfport Memorial Hospital, Harrison County, Mississippi." 511 So.2d, at 921. Therefore, the court said, the twins' domicile was in Harrison County and the state court properly exercised jurisdiction over the adoption proceedings. Indeed, the court appears to have concluded that, for this reason, *none* of the provisions of the ICWA was applicable. *Ibid.* ("[T]hese proceedings . . . actually escape applicable federal law on Indian Child Welfare"). In any case, it rejected the Tribe's contention that the requirements of the ICWA applicable in state courts had not been followed: "[T]he judge did conform and strictly adhere to the minimum federal standards governing adoption of Indian children with respect to parental consent, notice, service of process, etc." *Ibid.*<sup>13</sup>

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Because of the centrality of the exclusive tribal jurisdiction provision to the overall scheme of the ICWA, as well as the conflict between this decision of the Mississippi Supreme Court and those of several other state courts,<sup>14</sup> we granted plenary review. 486 U.S. 1021, 108 S.Ct.1993, 100 L.Ed.2d 225 (1988).<sup>15</sup> We now reverse.

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II

Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA. Indeed, some of the ICWA's jurisdictional provisions have a strong basis in pre-ICWA case law in the federal and state courts. See, e.g., *Fisher v. District Court, Sixteenth Judicial District of Montana*, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976) (*per curiam*) (tribal court had exclusive jurisdiction over adoption proceeding where all parties were tribal members and reservation residents); *Wisconsin Potowatomies of Hannahville Indian Community v. Houston*, 393 F.Supp. 719 (WD Mich.1973) (tribal court had exclusive jurisdiction over custody of Indian children found to have been domiciled on reservation); *Wakefield v. Little Light*, 276 Md. 333, 347 A.2d 228 (1975) (same); *In re Adoption of Buehl*, 87 Wash.2d 649, 555 P.2d 1334 (1976) (state court lacked jurisdiction over custody of Indian children placed in off-reservation foster care by tribal court order); see also *In re Lelah-puc-ka-chee*, 98 F. 429 (ND Iowa 1899) (state court lacked jurisdiction to appoint guardian for Indian child living on reservation). In enacting the ICWA Congress confirmed that, in child custody proceedings involving Indian children domiciled on the reservation, tribal jurisdiction was exclusive as to the States.

The state-court proceeding at issue here was a "child custody proceeding." That term is defined to include any " 'adoptive placement' which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption." 25 U.S.C. § 1903(1)(iv). Moreover, the twins were "Indian children." See 25 U.S.C. § 1903(4). The sole issue in this case is, as the Supreme Court of Mississippi recognized, whether the twins were "domiciled" on the reservation.<sup>16</sup>

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A

The meaning of "domicile" in the ICWA is, of course, a matter of Congress' intent. The ICWA itself does not define it. The initial question we must confront is whether there is any reason to believe that Congress intended the ICWA definition of "domicile" to be a matter of state law. While the meaning of a federal statute is necessarily a federal question in the sense that its construction remains subject to this Court's supervision, see P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's *The Federal Courts and the Federal System* 566 (3d ed. 1988); cf. *Reconstruction Finance Corporation v. Beaver County*, 32 U.S. 204, 210, 66 S.Ct. 992, 995, 90 L.Ed. 1172 (1946), Congress sometimes intends that a statutory term be given content by the application of state law. *De Sylva v. Ballentine*, 351 U.S. 570, 580, 76 S.Ct. 974, 980, 100 L.Ed. 1415 (1956); see also *Beaver County, supra*; *Helvering v. Stuart*, 317 U.S. 154, 161-162, 63 S.Ct. 140, 144-145, 87 L.Ed. 154 (1942). We start, however, with the general assumption that "in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Jerome v. United States*, 318 U.S. 101, 104, 63 S.Ct. 483, 485, 87 L.Ed. 640 (1943); *NLRB v. Natural Gas Utility Dist. of Hawkins County*, 402 U.S. 600, 603, 91 S.Ct. 1746, 1749, 29 L.Ed.2d 206 (1971); *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 119, 103 S.Ct. 986, 995, 74 L.Ed.2d 845 (1983). One reason for this rule of construction is that federal statutes are generally intended to have uniform nationwide application. *Jerome, supra*, 318 U.S., at 104, 63 S.Ct., at 485; *Dickerson, supra*, 460 U.S., at 119-120, 103 S.Ct., at 995-996; *United States v. Pelzer*, 312 U.S. 399, 402-403, 61 S.Ct. 659, 660-661, 85 L.Ed. 913 (1941). Accordingly, the cases in which we have

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found that Congress intended a state-law definition of a statutory term have often been

those where uniformity clearly was not intended. *E.g.*, *Beaver County*, *supra*, 328 U.S., at 209, 66 S.Ct., at 995 (statute permitting States to apply their diverse local tax laws to real property of certain Government corporations). A second reason for the presumption against the application of state law is the danger that "the federal program would be impaired if state law were to control." *Jerome*, *supra*, 318 U.S., at 104, 63 S.Ct., at 486; *Dickerson*, *supra*, 460 U.S., at 119-120, 103 S.Ct., at 995; *Pelzer*, 312 U.S., at 402-403, 61 S.Ct., at 661. For this reason, "we look to the purpose of the statute to ascertain what is intended." *Id.*, at 403, 61 S.Ct., at 661.

In *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944), we rejected an argument that the term "employee" as used in the Wagner Act should be defined by state law. We explained our conclusion as follows:

"Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no . . . patchwork plan for securing freedom of employees' organization and of collective bargaining. The Wagner Act is . . . intended to solve a national problem on a national scale. . . . Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by . . . varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems." *Id.*, at 123, 64 S.Ct., at 857.

See also *Natural Gas Utility Dist.*, *supra*, 402 U.S., at 603-604, 91 S.Ct., at 1749. For the two principal reasons that follow, we believe that what we said of the Wagner Act applies equally well to the ICWA.

First, and most fundamentally, the purpose of the ICWA gives no reason to

believe that Congress intended to rely on state law for the definition of a critical term; quite the contrary. It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its

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enactment, that Congress was concerned with the rights of Indian families and Indian communities vis-a-vis state authorities.<sup>17</sup> More specifically, its purpose was, in part, to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings. Indeed, the congressional findings that are a part of the statute demonstrate that Congress perceived the States and their courts as partly responsible for the problem it intended to correct. See 25 U.S.C. § 1901(5) (state "judicial bodies . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families").<sup>18</sup> Under these circumstances it is most improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law.

Second, Congress could hardly have intended the lack of nationwide uniformity that would result from state-law definitions of domicile. An example will illustrate. In a case quite similar to this one, the New Mexico state courts found exclusive jurisdiction in the tribal court pursuant to § 1911(a),

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because the illegitimate child took the reservation domicile of its mother at birth— notwithstanding that the child was placed in the custody of adoptive parents 2 days after its off-reservation birth and the mother executed a consent to adoption 10 days later. *In re Adoption of Baby Child*, 102 N.M. 735, 737-738, 700 P.2d 198, 200-201 (App.1985).<sup>19</sup> Had that mother traveled to Mississippi to

give birth, rather than to Albuquerque, a different result would have obtained if state-law definitions of domicile applied. The same, presumably, would be true if the child had been transported to Mississippi for adoption after her off-reservation birth in New Mexico. While the child's custody proceeding would have been subject to exclusive tribal jurisdiction in her home State, her mother, prospective adoptive parents, or an adoption intermediary could have obtained an adoption decree in state court merely by transporting her across state lines.<sup>20</sup> Even if we could conceive of a federal statute under which the rules of domicile (and thus of jurisdiction) applied differently to different Indian children, a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind.<sup>21</sup>

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We therefore think it beyond dispute that Congress intended a uniform federal law of domicile for the ICWA.<sup>22</sup>

B

It remains to give content to the term "domicile" in the circumstances of the present case. The holding of the Supreme Court of Mississippi that the twin babies were not domiciled on the Choctaw Reservation appears to have rested on two findings of fact by the trial court: (1) that they had never been physically present there, and (2) that they were "voluntarily surrendered" by their parents. 511 So.2d, at 921; see Record 78. The question before us, therefore, is whether under the ICWA definition of "domicile" such facts suffice to render the twins nondomiciliaries of the Reservation.

We have often stated that in the absence of a statutory definition we "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the

words used." *Richards v. United States*, 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962); *Russello v. United States*, 464 U.S. 16, 21, 104 S.Ct. 296, 299, 78 L.Ed.2d 17 (1983). We do so, of course, in the light of the " 'object and policy' " of the statute. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285, 76 S.Ct. 349, 359, 100 L.Ed. 309 (1956), quoting *United States v. Heirs of Boisdore*, 8 How. 113, 122, 12 L.Ed. 1009 (1849). We therefore look both to the generally accepted meaning of the term "domicile" and to the purpose of the statute.

That we are dealing with a uniform federal rather than a state definition does not, of course, prevent us from drawing on general state-law principles to determine "the ordinary meaning of the words used." Well-settled state law can inform our understanding of what Congress had in mind when it employed a term it did not define. Accordingly, we find it helpful to borrow established common-law principles of domi-

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cile to the extent that they are not inconsistent with the objectives of the congressional scheme.

"Domicile" is, of course, a concept widely used in both federal and state courts for jurisdiction and conflict-of-laws purposes, and its meaning is generally uncontroverted. See generally Restatement §§ 11-23; R. Leflar, L. McDougal, & R. Felix, *American Conflicts Law* 17-38 (4th ed. 1986); R. Weintraub, *Commentary on the Conflict of Laws* 12-24 (2d ed. 1980). "Domicile" is not necessarily synonymous with "residence," *Perri v. Kisselbach*, 34 N.J. 84, 87, 167 A.2d 377, 379 (1961), and one can reside in one place but be domiciled in another, *District of Columbia v. Murphy*, 314 U.S. 441, 62 S.Ct. 303, 86 L.Ed. 329 (1941); *In re Estate of Jones*, 192 Iowa 78, 80, 182 N.W. 227, 228 (1921). For adults, domicile is established by physical presence in a place in connection with a certain state of

mind concerning one's intent to remain there. *Texas v. Florida*, 306 U.S. 398, 424, 59 S.Ct. 563, 576, 83 L.Ed. 817 (1939). One acquires a "domicile of origin" at birth, and that domicile continues until a new one (a "domicile of choice") is acquired. *Jones, supra*, 192 Iowa, at 81, 182 N.W., at 228; *In re Estate of Moore*, 68 Wash.2d 792, 796, 415 P.2d 653, 656 (1966). Since most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents. *Yarborough v. Yarborough*, 290 U.S. 202, 211, 54 S.Ct. 181, 185, 78 L.Ed. 269 (1933). In the case of an illegitimate child, that has traditionally meant the domicile of its mother. *Kowalski v. Wojtkowski*, 19 N.J. 247, 258, 116 A.2d 6, 12 (1955); *Moore, supra*, 68 Wash.2d, at 796, 415 P.2d, at 656; Restatement § 14(2), § 22, Comment c; 25 Am.Jur.2d, Domicile § 69 (1966). Under these principles, it is entirely logical that "[o]n occasion, a child's domicile of origin will be in a place where the child has never been." Restatement § 14, Comment b.

It is undisputed in this case that the domicile of the mother (as well as the father) has been, at all relevant times, on the Choctaw Reservation. Tr. of Oral Arg. 28-29. Thus, it is clear that at their birth the twin babies were also domiciled

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on the reservation, even though they themselves had never been there. The statement of the Supreme Court of Mississippi that "[a]t no point in time can it be said the twins . . . were domiciled within the territory set aside for the reservation," 511 So.2d, at 921, may be a correct statement of that State's law of domicile, but it is inconsistent with generally accepted doctrine in this country and cannot be what Congress had in mind when it used the term in the ICWA.

Nor can the result be any different simply because the twins were "voluntarily surrendered" by their mother. Tribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians. See 25 U.S.C. §§ 1901(3) ("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children"), 1902 ("promote the stability and security of Indian tribes").<sup>23</sup> The numerous prerogatives accorded the tribes through the ICWA's substantive provisions, e.g., §§ 1911(a) (exclusive jurisdiction over reservation domiciliaries), 1911(b) (presumptive jurisdiction over nondomiciliaries), 1911(c) (right of intervention), 1912(a) (notice), 1914 (right to petition for invalidation of state-court action), 1915(c) (right to alter presumptive placement priorities applicable to state-court actions), 1915(e) (right to obtain records), 1919 (authority to conclude agreements with States), must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves.

In addition, it is clear that Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children

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themselves of such placements outside their culture.<sup>24</sup> Congress determined to subject such placements to the ICWA's jurisdictional and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents. As the 1977 Final Report of the congressionally established American Indian Policy Review Commission stated, in

summarizing these two concerns, "[r]emoval of Indian children from their cultural setting seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children." Senate Report, at 52.<sup>25</sup>

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These congressional objectives make clear that a rule of domicile that would permit individual Indian parents to defeat the ICWA's jurisdictional scheme is inconsistent with what Congress intended.<sup>26</sup> See *in RE adoption oF child oF indiaN heritage*, 111 N.J. 155, 168-171, 543 A.2d 925, 931-933 (1988). The appellees in this case argue strenuously that the twins' mother went to great lengths to give birth off the reservation so that her children could be adopted by the Holyfields. But that was precisely part of Congress' con-

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cern. Permitting individual members of the tribe to avoid tribal exclusive jurisdiction by the simple expedient of giving birth off the reservation would, to a large extent, nullify the purpose the ICWA was intended to accomplish.<sup>27</sup> The Supreme Court of Utah expressed this well in its scholarly and sensitive opinion in what has become a leading case on the ICWA:

"To the extent that [state] abandonment law operates to permit [the child's] mother to change [the child's] domicile as part of a scheme to facilitate his adoption by non-Indians while she remains a domiciliary of the reservation, it conflicts with and undermines the operative scheme established by subsections [1911(a) ] and [1913(a) ] to deal with children of domiciliaries of the reservation and weakens considerably the tribe's ability to assert its interest in its children. The protection of this tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest

in the child which is distinct from but on a parity with the interest of the parents. This relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic cultures found in the United States. It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize. It is precisely in recognition of this relationship, however, that the ICWA designates the tribal court as the exclusive forum for the determination of custody and

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adoption matters for reservation-domiciled Indian children, and the preferred forum for nondomiciliary Indian children. [State] abandonment law cannot be used to frustrate the federal legislative judgment expressed in the ICWA that the interests of the tribe in custodial decisions made with respect to Indian children are as entitled to respect as the interests of the parents." *In re Adoption of Holloway*, 732 P.2d 962, 969-970 (1986).

We agree with the Supreme Court of Utah that the law of domicile Congress used in the ICWA cannot be one that permits individual reservation-domiciled tribal members to defeat the tribe's exclusive jurisdiction by the simple expedient of giving birth and placing the child for adoption off the reservation. Since, for purposes of the ICWA, the twin babies in this case were domiciled on the reservation when adoption proceedings were begun, the Choctaw tribal court possessed exclusive jurisdiction pursuant to 25 U.S.C. § 1911(a). The Chancery Court of Harrison County was, accordingly, without jurisdiction to enter a decree of adoption; under ICWA § 104, 25 U.S.C. § 1914, its decree of January 28, 1986, must be vacated.

III

We are not unaware that over three years have passed since the twin babies were born and placed in the Holyfield home, and that a court deciding their fate today is not writing on a blank slate in the same way it would have in January 1986. Three years' development of family ties cannot be undone, and a separation at this point would doubtless cause considerable pain.

Whatever feelings we might have as to where the twins should live, however, it is not for us to decide that question. We have been asked to decide the legal question of *who* should make the custody determination concerning these children—not what the outcome of that determination should be. The law places that decision in the hands of the Choctaw tribal court. Had the mandate of the ICWA been followed in

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1986, of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to "reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation." *Halloway*, 732 P.2d, at 972. It is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe—and perhaps the children themselves—in having them raised as part of the Choctaw community.<sup>28</sup> Rather, "we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy." *Ibid*.

The judgment of the Supreme Court of Mississippi is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

Justice STEVENS, with whom THE CHIEF JUSTICE and Justice KENNEDY join, dissenting.

The parents of these twin babies unquestionably expressed their intention to have the state court exercise jurisdiction over them. J.B. gave birth to the twins at a hospital 200 miles from the reservation, even though a closer hospital was available. Both parents gave their written advance consent to the adoption and, when the adoption was later challenged by the Tribe, they reaffirmed their desire that the Holyfields adopt the two children. As the Mississippi Supreme Court found, "the parents went to some efforts to prevent the children from being placed on the reservation as the mother arranged for their birth and adoption in Gulfport Memorial Hospital, Harrison County, Mississippi." 511 So.2d 918, 921 (1987). Indeed, Appellee Vivian Holyfield appears before us today, urging that she be allowed to retain custody of B.B. and G.B.

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Because J.B.'s domicile is on the reservation and the children are eligible for membership in the Tribe, the Court today closes the state courthouse door to her. I agree with the Court that Congress intended a uniform federal law of domicile for the Indian Child Welfare Act of 1978 (ICWA), 92 Stat. 3069, 25 U.S.C. §§ 1901-1963, and that domicile should be defined with reference to the objectives of the congressional scheme. "To ascertain [the term's] meaning we . . . consider the Congressional history of the Act, the situation with reference to which it was enacted, and the existing judicial precedents, with which Congress may be taken to have been familiar in at least a general way." *District of Columbia v. Murphy*, 314 U.S. 441, 449, 62 S.Ct. 303, 307, 86 L.Ed. 329 (1941). I cannot agree, however, with the cramped definition the Court gives that term. To preclude parents domiciled on a reservation from deliberately invoking the adoption

procedures of state court, the Court gives "domicile" a meaning that Congress could not have intended and distorts the delicate balance between individual rights and group rights recognized by the ICWA.

The ICWA was passed in 1978 in response to congressional findings that "an alarmingly high percentage of Indian families are broken up by the *removal*, often unwarranted, of their children from them by nontribal public and private agencies," and that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. §§ 1901(4), (5) (emphasis added). The Act is thus primarily addressed to the unjustified removal of Indian children from their families through the application of standards that inadequately recognized the distinct Indian culture.<sup>1</sup>

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The most important provisions of the ICWA are those setting forth minimum standards for the placement of Indian children by state courts and providing procedural safeguards to insure that parental rights are protected.<sup>2</sup> The Act pro-

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vides that any party seeking to effect a foster care placement of, or involuntary termination of parental rights to, an Indian child must establish by stringent standards of proof that efforts have been made to prevent the breakup of the Indian family, and that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. §§ 1912(d), (e), (f). Each party to the proceeding has a right to examine all reports and documents filed with the court, and an indigent parent or custodian

has the right to appointment of counsel. §§ 1912(b), (c). In the case of a voluntary termination, the ICWA provides that consent is valid only if given after the terms and consequences of the consent have been fully explained, may be withdrawn at any time up to the final entry of a decree of termination or adoption, and even then may be collaterally attacked on the grounds that it was obtained through fraud or duress. § 1913. Finally, because the Act protects not only the rights of the parents, but also the interests of the tribe and the Indian children, the Act sets forth criteria for adoptive, foster care, and preadoptive placements that favor the Indian child's extended family or tribe, and that can be altered by resolution of the tribe. § 1915.

The Act gives Indian tribes certain rights, not to restrict the rights of parents of Indian children, but to complement and help effect them. The Indian tribe may petition to transfer an action in state court to the tribal court, but the Indian parent may veto the transfer. § 1911(b).<sup>3</sup> The Act

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provides for a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. §§ 1911(c), 1912(a).<sup>4</sup> Finally, the tribe may petition the court to set aside a parental termination action upon a showing that the provisions of the ICWA that are designed to protect parents and Indian children have been violated. § 1914.<sup>5</sup>

While the Act's substantive and procedural provisions effect a major change in state child custody proceedings, its jurisdictional provision is designed primarily to preserve tribal sovereignty over the domestic relations of tribe members and to confirm a developing line of cases which held that the tribe's exclusive jurisdiction could not be defeated by the temporary presence of an Indian child off the reservation. The legislative history indicates that Congress did not intend "to oust the States of their

traditional jurisdiction over Indian children falling within their geographic limits." House Report, at 19, U.S.Code Cong. & Admin.News 1978, at 7541; Wamser, Child Welfare Under the Indian Child Welfare Act of 1978: A New Mexico Focus, 10 N.M.L.Rev. 413, 416 (1980). The apparent intent of Congress was to overrule such decisions as that in *In re Cantrell*, 159 Mont. 66, 495 P.2d 179 (1972), in which the State placed an Indian child, who had lived on a reservation with his mother, in a foster home only three days after he left the reservation to accompany his father on a trip. Jones, Indian Child Welfare: A Jurisdictional Approach, 21 Ariz.L.Rev. 1123, 1129 (1979). Congress specifically approved a series of cases in which the state courts declined jurisdiction over Indian children who were wards of the tribal court, *In re Adoption of Buehl*, 87 Wash.2d 649, 555 P.2d 1334 (1976); *Wakefield v. Little Light*, 276 Md. 33, 347 A.2d 228 (1975), or whose

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parents were temporarily residing off the reservation, *Wisconsin Potowatomies of Hannahville Indian Community v. Houston*, 393 F.Supp. 719 (WD Mich.1973), but exercised jurisdiction over Indian children who had never lived on a reservation and whose Indian parents were not then residing on a reservation, *In re Greybull*, 23 Or.App. 674, 543 P.2d 1079 (1975); see House Report, at 21, U.S.Code Cong. & Admin.News 1978, at 7543.<sup>6</sup> It did not express any disapproval of decisions such as that of the United States Court of Appeals for the Ninth Circuit in *United States ex rel. Cobell v. Cobell*, 503 F.2d 790 (9th Cir.1974), cert. denied, 421 U.S. 999, 95 S.Ct. 2396, 44 L.Ed.2d 666 (1975), which indicated that a Montana state court could exercise jurisdiction over an Indian child custody dispute because the parents, "by voluntarily invoking the state court's jurisdiction for divorce purposes, . . . clearly submitted the question of their children's custody to the judgment of the Montana state courts." 503 F.2d, at 795 (emphasis deleted).

The Report of the American Indian Policy Review Commission, an early proponent of the ICWA, makes clear the limited purposes that the term "domicile" was intended to serve:

"Domicile is a legal concept that does not depend exclusively on one's physical location at any one given moment in time, rather it is based on the apparent intention of permanent residency. Many Indian families move back and forth from a reservation dwelling to border communities or even to distant communities, depending on em-

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ployment and educational opportunities. . . . In these situations, where family ties to the reservation are strong, but the child is temporarily off the reservation, a fairly strong legal argument can be made for tribal court jurisdiction." Report on Federal, State, and Tribal Jurisdiction 86 (Comm.Print 1976).<sup>7</sup>

Although parents of Indian children are shielded from the exercise of state jurisdiction when they are temporarily off the reservation, the Act also reflects a recognition that allowing the tribe to defeat the parents' deliberate choice of jurisdiction would be conducive neither to the best interests of the child nor to the stability and security of Indian tribes and families. Section 1911(b), providing for the exercise of concurrent jurisdiction by state and tri al courts when the Indian child is not domiciled on the reservation, gives the Indian parents a veto to prevent the transfer of a state-court action to tribal court.<sup>8</sup> "By allowing the Indian parents to

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'choose' the forum that will decide whether to sever the parent-child relationship, Congress promotes the security of Indian families by allowing the Indian parents to defend in the

court system that most reflects the parents' familial standards." Jones, 21 Ariz.L.Rev., at 1141. As Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians, stated in testimony to the House Subcommittee on Indian Affairs and Public Lands with respect to a different provision:

"The ultimate responsibility for child welfare rests with the parents and we would not support legislation which interfered with that basic relationship." Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess., 62 (1978).<sup>9</sup>

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If J.B. and W.J. had established a domicile off the reservation, the state courts would have been required to give effect to their choice of jurisdiction; there should not be a different result when the parents have not changed their own domicile, but have expressed an unequivocal intent to establish a domicile for their children off the reservation. The law of abandonment, as enunciated by the Mississippi Supreme Court in this case, does not defeat, but serves the purposes, of the Act. An abandonment occurs when a parent deserts a child and places the child with another with an intent to relinquish all parental rights and obligations. Restatement (Second) of Conflict of Laws § 22, Comment e (1971) (hereinafter Restatement); *In re Adoption of Halloway*, 732 P.2d 962, 966 (Utah 1986). If a child is abandoned by his mother, he takes on the domicile of his father; if the child is abandoned by his father, he takes on the domicile of his mother. Restatement § 22, Comment e; 25 Am.Jur.2d, Domicil § 69 (1966). If the child is abandoned by both parents, he takes on the domicile of a person other than the parents who stands *in loco parentis* to him. *In re Adoption of Halloway*, *supra*, at 966; *In re Estate of Moore*, 68 Wash.2d 792, 796, 415 P.2d 653, 656 (1966); *Harlan v. Industrial Accident*

*Comm'n*, 194 Cal. 352, 228 P. 654 (1924); Restatement § 22, Comment i ; cf. *In re Guardianship of D.L.L. and C.L.L.*, 291 N.W.2d 278, 282 (S.D.1980).<sup>10</sup> To be effective, the intent to abandon or the actual physical abandonment must be shown by clear and convincing evidence. *In re Adoption of Halloway*, *supra*, at 966; *C.S. v. Smith*, 483 S.W.2d 790, 793 (Mo.App.1972).<sup>11</sup>

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When an Indian child is temporarily off the reservation, but has not been abandoned to a person off the reservation, the tribe has an interest in exclusive jurisdiction. The ICWA expresses the intent that exclusive tribal jurisdiction is not so frail that it should be defeated as soon as the Indian child steps off the reservation. Similarly, when the child is abandoned by one parent to a person off the reservation, the tribe and the other parent domiciled on the reservation may still have an interest in the exercise of exclusive jurisdiction. That interest is protected by the rule that a child abandoned by one parent takes on the domicile of the other. But when an Indian child is deliberately abandoned by both parents to a person off the reservation, no purpose of the ICWA is served by closing the state courthouse door to them. The interests of the parents, the Indian child, and the tribe in preventing the unwarranted removal of Indian children from their families and from the reservation are protected by the Act's substantive and procedural provisions. In addition, if both parents have intentionally invoked the jurisdiction of the state court in an action involving a non-Indian, no interest in tribal self-governance is implicated. See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173, 93 S.Ct. 1257, 1263, 36 L.Ed.2d 129 (1973); *Williams v.*

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*Lee*, 358 U.S. 217, 219-220, 79 S.Ct. 269, 270-271, 3 L.Ed.2d 251 (1959); *Felix v. Patrick*,

145 U.S. 317, 332, 12 S.Ct. 862, 867, 36 L.Ed. 719 (1892).

The interpretation of domicile adopted by the Court requires the custodian of an Indian child who is off the reservation to haul the child to a potentially distant tribal court unfamiliar with the child's present living conditions and best interests. Moreover, it renders any custody decision made by a state court forever suspect, susceptible to challenge at any time as void for having been entered in the absence of jurisdiction.<sup>12</sup> Finally, it forces parents of Indian children who desire to invoke state-court jurisdiction to establish a domicile off the reservation. Only if the custodial parent has the wealth and ability to establish a domicile off the reservation will the parent be able to use the processes of state court. I fail to see how such a requirement serves the paramount congressional purpose of "promot[ing] the stability and security of Indian tribes and families." 25 U.S.C. § 1902.

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The Court concludes its opinion with the observation that whatever anguish is suffered by the Indian children, their natural parents, and their adoptive parents because of its decision today is a result of their failure to initially follow the provisions of the ICWA. *Ante*, at 53-54. By holding that parents who are domiciled on the reservation cannot voluntarily avail themselves of the adoption procedures of state court and that all such proceedings will be void for lack of jurisdiction, however, the Court establishes a rule of law that is virtually certain to ensure that similar anguish will be suffered by other families in the future. Because that result is not mandated by the language of the ICWA and is contrary to its purposes, I respectfully dissent.

<sup>1</sup> For example, Dr. Joseph Westermeyer, a University of Minnesota social psychiatrist, testified about his research with Indian

adolescents who experienced difficulty coping in white society, despite the fact that they had been raised in a purely white environment:

"[T]hey were raised with a white cultural and social identity. They are raised in a white home. They attended, predominantly white schools, and in almost all cases, attended a church that was predominantly white, and really came to understand very little about Indian culture, Indian behavior, and had virtually no viable Indian identity. They can recall such things as seeing cowboys and Indians on TV and feeling that Indians were a historical figure but were not a viable contemporary social group.

"Then during adolescence, they found that society was not to grant them the white identity that they had. They began to find this out in a number of ways. For example, a universal experience was that when they began to date white children, the parents of the white youngsters were against this, and there were pressures among white children from the parents not to date these Indian children. . . .

"The other experience was derogatory name calling in relation to their racial identity. . . .

\* \* \* \* \*

"[T]hey were finding that society was putting on them an identity which they didn't possess and taking from them an identity that they did possess." 1974 Hearings, at 46.

<sup>2</sup> Hearing on S. 1214 before the Senate Select Committee on Indian Affairs, 95th Cong., 1st Sess. (1977) (hereinafter 1977 Hearings); Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess. (1978) (hereinafter 1978 Hearings).

3. These sentiments were shared by the ICWA's principal sponsor in the House, Rep. Morris Udall, see 124 Cong.Rec. 38102 (1978) ("Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy"), and its minority sponsor, Rep. Robert Lagomarsino, see *ibid.* ("This bill is directed at conditions which . . . threaten . . . the future of American Indian tribes . . .").

4. One of the particular points of concern was the failure of non-Indian child welfare workers to understand the role of the extended family in Indian society. The House Report on the ICWA noted: "An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights." House Report, at 10, U.S.Code Cong. & Admin.News 1978, at 7532. At the conclusion of the 1974 Senate hearings, Senator Abourezk noted the role that such extended families played in the care of children: "We've had testimony here that in Indian communities throughout the Nation there is no such thing as an abandoned child because when a child does have a need for parents for one reason or another, a relative or a friend will take that child in. It's the extended family concept." 1974 Hearings, at 473. See also *Wisconsin Potowatomies of Hannahville Indian Community v. Houston*, 393 F.Supp. 719 (WD Mich.1973) (discussing custom of extended family and tribe assuming responsibility for care of orphaned children).

5. Section 1911(a) reads in full:

"An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the

reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child."

6. The quoted passages are from the House Report's discussion of § 1915, in which the ICWA attempts to accomplish these aims, in regard to nondomiciliaries of the reservation, through the establishment of standards for state-court proceedings. In regard to reservation domiciliaries, these goals are pursued through the establishment of exclusive tribal jurisdiction under § 1911(a).

Beyond its jurisdictional and other provisions concerning child custody proceedings, the ICWA also created, in its Title II, a program of grants to Indian tribes and organizations to aid in the establishment of child welfare programs. See 25 U.S.C. §§ 1931-1934.

7. Section 103(a) of the ICWA, 25 U.S.C. § 1913(a), requires that any voluntary consent to termination of parental rights be executed in writing and recorded before a judge of a "court of competent jurisdiction," who must certify that the terms and consequences of the consent were fully explained and understood. Section 1913(a) also provides that any consent given prior to birth or within 10 days thereafter is invalid. In this case the mother's consent was given 12 days after the birth. See also n. 26, *infra*.

8. W.J.'s consent to adoption was signed before a notary public in Neshoba County on January 11, 1986. Record 11-12. Only on June 3, 1986, however—well after the decree of adoption had been entered and after the Tribe had filed suit to vacate that decree—did the chancellor of the Chancery Court certify that W.J. had appeared before him in Harrison County to execute the consent to adoption. *Id.*, at 12-A.

9. Appellee Orrey Holyfield died during the pendency of this appeal.

10. Mississippi adoption law provides for a 6-month waiting period between interlocutory and final decrees of adoption, but grants the chancellor discretionary authority to waive that requirement and immediately enter a final decree of adoption. See Miss.Code Ann. § 93-17-13 (1972). The chancellor did so here, Record 14, with the result that the final decree of adoption was entered less than one month after the babies' birth.

11. The chancellor's certificates that the parents had appeared before him to consent to the adoption recited that "the Consent and Waiver was given in full compliance with Section 103(a) of Public Law 95-608" (*i.e.*, 25 U.S.C. § 1913(a)). Record 10, 12-A.

12. The ICWA specifically confers standing on the Indian child's tribe to participate in child custody adjudications. Title 25 U.S.C. § 1914 authorizes the tribe (as well as the child and its parents) to petition a court to invalidate any foster care placement or termination of parental rights under state law "upon a showing that such action violated any provision of sections 101, 102, and 103" of the ICWA. 92 Stat. 3072. See also § 1911(c) (Indian child's tribe may intervene at any point in state-court proceedings for foster care placement or termination of parental rights). "Termination of parental rights" is defined in § 1903(1)(ii) as "any action resulting in the termination of the parent-child relationship."

13. The lower court may well have fulfilled the applicable ICWA procedural requirements. But see n. 8, *supra*, and n. 26, *infra*. It clearly did not, however, comply with or even take cognizance of the substantive mandate of § 1915(a): "In any adoptive placement of an Indian child *under State law*, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a

member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." (Emphasis added.) Section 1915(e), moreover, requires the court to maintain records "evidencing the efforts to comply with the order of preference specified in this section." Notwithstanding the Tribe's argument below that § 1915 had been violated, see Brief for Appellant 20-22 and Appellant's Brief in Support of Petition for Rehearing 11-12 in No. 57,659 (Miss.Sup.Ct.), the Mississippi Supreme Court made no reference to it, merely stating in conclusory fashion that the "minimum federal standards" had been met. 511 So.2d, at 921.

14. See, *e.g.*, *In re Adoption of Holloway*, 732 P.2d 962 (Utah 1986); *In re Adoption of Baby Child*, 102 N.M. 735, 700 P.2d 198 (App.1985); *In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (App.1981), cert. denied *sub nom. Catholic Social Services of Tucson v. P.C.*, 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875 (1982).

15. Because it was unclear whether this case fell within the Court's appellate jurisdiction, we postponed consideration of our jurisdiction to the hearing on the merits. Pursuant to the version of 28 U.S.C. § 1257(2) applicable to this appeal, we have appellate jurisdiction to review a state-court judgment "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." It is sufficient that the validity of the state statute be challenged and sustained as applied to a particular set of facts. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 473-474, n. 4, 109 S.Ct. 1248, 1252, n. 4, 103 L.Ed.2d 488 (1989); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 288-290, 42 S.Ct. 106, 107-108, 66 L.Ed. 239 (1921). In practice, whether such an as-applied challenge comes

within our appellate jurisdiction often turns on how that challenge is framed. See *Hanson v. Denckla*, 357 U.S. 235, 244, 78 S.Ct. 1228, 1234, 2 L.Ed.2d 1283 (1958); *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 650-651, 62 S.Ct. 857, 859-860, 86 L.Ed. 1090 (1942).

In the present case appellants argued below "that the state lower court jurisdiction over these adoptions was preempted by plenary federal legislation." Brief for Appellant in No. 57,659 (Miss.Sup.Ct.), p. 5. Whether this formulation "squarely" challenges the validity of the state adoption statute as applied, see *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-441, 99 S.Ct. 1813, 1817, 60 L.Ed.2d 336 (1979), or merely asserts a federal right or immunity, 28 U.S.C. § 1257(3), is a difficult question to which the answer must inevitably be somewhat arbitrary. Since in the near future our appellate jurisdiction will extend only to rare cases, see Pub.L. 100-352, 102 Stat. 662, it is also a question of little prospective importance. Rather than attempting to resolve this question, therefore, we think it advisable to assume that the appeal is improper and to consider by writ of certiorari the important question this case presents. See *Spencer v. Texas*, 385 U.S. 554, 557, n. 3, 87 S.Ct. 648, 650, n. 3, 17 L.Ed.2d 606 (1967). We therefore dismiss the appeal, treat the papers as a petition for writ of certiorari, 28 U.S.C. § 2103, and grant the petition. (For convenience, we will continue to refer to the parties as appellant and appellees.)

<sup>16</sup>. "Reservation" is defined quite broadly for purposes of the ICWA. See 25 U.S.C. § 1903(10). There is no dispute that the Choctaw Reservation falls within that definition.

Section 1911(a) does not apply "where such jurisdiction is otherwise vested in the State by existing Federal law." This proviso would appear to refer to Pub.L. 280, 67 Stat. 588, as

amended, which allows States under certain conditions to assume civil and criminal jurisdiction on the reservations. Title 25 U.S.C. § 1918 permits a tribe in that situation to reassume jurisdiction over child custody proceedings upon petition to the Secretary of the Interior. The State of Mississippi has never asserted jurisdiction over the Choctaw Reservation under Public Law 280. See F. Cohen, *Handbook of Federal Indian Law* 362-363, and nn. 122-125 (1982); cf. *United States v. John*, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978).

<sup>17</sup>. This conclusion is inescapable from a reading of the entire statute, the main effect of which is to curtail state authority. See especially §§ 1901, 1911-1916, 1918.

<sup>18</sup>. See also 124 Cong.Rec. 38103 (1978) (letter from Rep. Morris K. Udall to Assistant Attorney General Patricia M. Wald) ("[S]tate courts and agencies and their procedures share a large part of the responsibility" for the crisis threatening "the future and integrity of Indian tribes and Indian families"); House Report, at 19, U.S.Code Cong. & Admin.News 1978, at 7541 ("Contributing to this problem has been the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future"). See also *In re Adoption of Halloway*, 732 P.2d, at 969 (Utah state court "quite frankly might be expected to be more receptive than a tribal court to [Indian child's] placement with non-Indian adoptive parents. Yet this receptivity of the non-Indian forum to non-Indian placement of an Indian child is precisely one of the evils at which the ICWA was aimed").

<sup>19</sup>. Some details of the *Baby Child* case are taken from the briefs in *Pino v. District Court, Bernalillo County*, 469 U.S. 1031, 105 S.Ct. 501, 83 L.Ed.2d 393 (1984). That appeal

was dismissed under this Court's Rule 53, 472 U.S. 1001, 105 S.Ct. 2693, 86 L.Ed.2d 709 (1985), following the appellant's successful collateral attack, in the case cited in the text, on the judgment from which appeal had been taken.

20. Nor is it inconceivable that a State might apply its law of domicile in such a manner as to render inapplicable § 1911(a) even to a child who had lived several years on the reservation but was removed from it for the purpose of adoption. Even in the less extreme case, a state-law definition of domicile would likely spur the development of an adoption brokerage business. Indian children, whose parents consented (with or without financial inducement) to give them up, could be transported for adoption to States like Mississippi where the law of domicile permitted the proceedings to take place in state court.

21. For this reason, the general rule that domicile is determined according to the law of the forum, see Restatement (Second) of Conflict of Laws § 13 (1971) (hereinafter Restatement), can have no application here.

22. We note also the likelihood that, had Congress intended a state-law definition of domicile, it would have said so. Where Congress did intend that ICWA terms be defined by reference to other than federal law, it stated this explicitly. See § 1903(2) ("extended family member" defined by reference to tribal law or custom); § 1903(6) ("Indian custodian" defined by reference to tribal law or custom and to state law).

23. See also *supra*, at 34, and n. 3.

24. In large part the concerns that emerged during the congressional hearings on the ICWA were based on studies showing recurring developmental problems encountered during adolescence by Indian children raised in a white environment. See n.

1, *supra*. § e also 1977 Hearings, at 114 (statement of American Academy of Child Psychiatry); S.Rep. No. 95-597, p. 43 (1977) (hereinafter Senate Report). More generally, placements in non-Indian homes were seen as "depriving the child of his or her tribal and cultural heritage." *Id.*, at 45; see also 124 Cong.Rec. 38102-38103 (1978) (remarks of Rep. Lagomarsino). The Senate Report on the ICWA incorporates the testimony in this sense of Louis La Rose, chairman of the Winnebago Tribe, before the American Indian Policy Review Commission:

"I think the cruelest trick that the white man has ever done to Indian children is to take them into adoption courts, erase all of their records and send them off to some nebulous family that has a value system that is A-1 in the State of Nebraska and that child reaches 16 or 17, he is a little brown child residing in a white community and he goes back to the reservation and he has absolutely no idea who his relatives are, and they effectively make him a non-person and I think . . . they destroy him." Senate Report, at 43.

Thus, the conclusion seems justified that, as one state court has put it, "[t]he Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." *In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz., at 204, 635 P.2d, at 189.

25. While the statute itself makes clear that Congress intended the ICWA to reach voluntary as well as involuntary removal of Indian children, the same conclusion can also be drawn from the ICWA's legislative history. For example, the House Report contains the following expression of Congress' concern with both aspects of the problem:

"One of the effects of our national paternalism has been to so alienate some Indian [parents] from their society that they abandon their children at hospitals or to

welfare departments rather than entrust them to the care of relatives in the extended family. Another expression of it is the involuntary, arbitrary, and unwarranted separation of families." House Report, at 12, U.S.Code Cong. & Admin.News 1978, at 7534.

26. The Bureau of Indian Affairs pointed out, in issuing nonbinding ICWA guidelines for the state courts, that the terms "residence" and "domicile" "are well defined under existing state law. There is no indication that these state law definitions tend to undermine in any way the purposes of the Act." 44 Fed.Reg. 67584, 67585 (1979). The clear implication is that state law that *did* tend to undermine the ICWA's purposes could not be taken to express Congress' intent. There is some authority for the proposition that abandonment can effectuate a change in the child's domicile, *In re Adoption of Halloway*, 732 P.2d, at 967, although this may not be the majority rule. See Restatement § 22, Comment e (abandoned child generally retains the domicile of the last-abandoning parent). In any case, as will be seen below, the Supreme Court of Utah declined in the *Halloway* case to apply Utah abandonment law to defeat the purpose of the ICWA. Similarly, the conclusory statement of the Supreme Court of Mississippi that the twin babies had been "legally abandoned," 511 So.2d, at 921, cannot be determinative of ICWA jurisdiction.

There is also another reason for reaching this conclusion. The predicate for the state court's abandonment finding was the parents' consent to termination of their parental rights, recorded before a judge of the state Chancery Court. ICWA § 103(a), 25 U.S.C. § 1913(a), requires, however, that such a consent be recorded before "a judge of a court of competent jurisdiction." See n. 7, *supra*. In the case of reservation-domiciled children, that could be only the tribal court. The children therefore could not be made non-

domiciliaries of the reservation through any such state-court consent.

27. It appears, in fact, that all Choctaw women give birth off the reservation because of the lack of appropriate obstetric facilities there. See Juris.Statement 4, n. 2. In most cases, of course, the mother and child return to the reservation after the birth, and this would presumably be sufficient to make the child a reservation domiciliary even under the Mississippi court's theory. Application of the Mississippi domicile rule would, however, permit state authorities to avoid the tribal court's exclusive § 1911(a) jurisdiction by removing a newborn from an allegedly unfit mother while in the hospital, and seeking to terminate her parental rights in state court.

28. We were assured at oral argument that the Choctaw court has the authority under the tribal code to permit adoption by the present adoptive family, should it see fit to do so. Tr. of Oral Arg. 17.

1. The House Report found that "Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole." H.R.Rep. No. 95-1386, p. 9 (1978) (hereinafter House Report), U.S.Code Cong. & Admin.News 1978, p. 7531. The Senate Report similarly states that the Act was motivated by "reports that an alarmingly high percentage of Indian children were being separated from their natural parents through the actions of nontribal government agencies." S.Rep. No. 95-597, p. 11 (1977). See also 124 Cong.Rec. 12532 (1978) (remarks of Rep. Udall) ("The record developed by the Policy Review Commission, by the Senate Interior Committee in the 94th Congress;

and by the Senate Select Committee on Indian Affairs and our own Interior Committee in the 95th Congress has disclosed what almost amounts to a callous raid on Indian children. Indian children are removed

from their parents and families by State agencies for the most specious of reasons in proceedings foreign to the Indian parents"); *id.*, at 38102 (remarks of Rep. Udall) ("Studies have revealed that about 25 percent of all Indian children are removed from their homes and placed in some foster care or adoptive home or institution"); *id.*, at 38103 (remarks of Rep. Lagomarsino) ("For Indians generally and tribes in particular, the continued wholesale removal of their children by nontribal government and private agencies constitutes a serious threat to their existence as ongoing, self-governing communities"); Hearing on S. 1214 before the Senate Select Committee on Indian Affairs, 95th Cong., 1st Sess., 1 (1977) ("It appears that for decades Indian parents and their children have been at the mercy of arbitrary or abusive action of local, State, Federal and private agency officials. Unwarranted removal of children from their homes is common in Indian communities").

2. "The purpose of the bill (H.R. 12533), introduced by Mr. Udall et al., is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or institutions which will reflect the unique values of Indian culture and by providing for assistance to Indian tribes and organizations in the operation of child and family service programs." House Report, at 8 (footnote omitted), U.S.Code Cong. & Admin.News 1978, at 7530. See also 124 Cong.Rec. 38102 (1978) (remarks of Rep. Udall) ("[The Act] clarifies the allocation of jurisdiction over Indian child custody proceedings between Indian tribes and the States. More importantly, it establishes minimum Federal standards and procedural safeguards to protect Indian families when faced with child custody proceedings against them in State agencies or courts").

3. The statute provides in part:

"(b) Transfer of proceedings; declination by tribal court

"In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe." 25 U.S.C. § 1911.

4. See 44 Fed.Reg. 67584, 67586 (1979) ("The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones").

5. Significantly, the tribe cannot set aside a termination of parental rights on the ground that the adoptive placement provisions of § 1915, favoring placement with the tribe, have not been followed.

6. None of the cases cited approvingly by Congress involved a deliberate abandonment. In *Wakefield v. Little Light*, 276 Md. 333, 347 A.2d 228 (1975), the court upheld exclusive tribal jurisdiction where it was clear that there was no abandonment. In *Wisconsin Potowatomies of Hannahville Indian Community v. Houston*, 393 F.Supp. 719 (WD Mich.1973), there was no abandonment, the children had lived on the reservation and were members of the Indian Tribe, and the children's clothing and toys were at a home on the reservation that continued to be available to them. Finally, in *In re Adoption of Buehl*, 87 Wash.2d 649, 555 P.2d 1334 (1976), the child was a ward of the tribal court and an enrolled member of the Tribe.

7. In a letter to the House of Representatives, the Department of Justice explained its understanding that the provision was addressed to the involuntary termination of parental rights in tribal members by state agencies unaware of exclusive tribal jurisdiction:

"As you may be aware, the courts have consistently recognized that tribal governments have exclusive jurisdiction over the domestic relationships of tribal members located on reservations, unless a State has assumed concurrent jurisdiction pursuant to Federal legislation such as Public Law 83-280. It is our understanding that this legal principle is often ignored by local welfare organizations and foster homes in cases where they believe Indian children have been neglected, and that S.1214 is designed to remedy this, and to define Indian rights in such cases." House Report, at 35, U.S.Code Cong. & Admin.News 1978, at 7558.

8. The explanation of this subsection in the House Report reads as follows:

"Subsection (b) directs a State court, having jurisdiction over an Indian child custody proceeding to transfer such proceeding, absent good cause to the contrary, to the appropriate tribal court upon the petition of the parents or the Indian tribe. Either parent is given the right to veto such transfer. The subsection is intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." *Id.*, at 21, U.S.Code Cong. & Admin.News 1978, at 7544.

In commenting on the provision, the Department of Justice suggested that the section should be clarified to make it perfectly clear that a state court need not surrender jurisdiction of a child custody proceeding if

the Indian parent objected. The Department of Justice letter stated:

"Section 101(b) should be amended to prohibit clearly the transfer of a child placement proceeding to a tribal court when any parent or child over the age of 12 objects to the transfer." *Id.*, at 32, U.S.Code Cong. & Admin.News 1978, at 7554.

Although the specific suggestion made by the Department of Justice was not in fact implemented, it is noteworthy that there is nothing in the legislative history to suggest that the recommended change was in any way inconsistent with any of the purposes of the statute.

9. Chief Isaac elsewhere expressed a similar concern for the rights of parents with reference to another provision. See Hearing, *supra* n. 1, at 158 (statement on behalf of National Tribal Chairmen's Association) ("We believe the tribe should receive notice in all such cases but where the child is neither a resident nor domiciliary of the reservation intervention should require the consent of the natural parents or the blood relative in whose custody the child has been left by the natural parents. It seems there is a great potential in the provisions of section 101(c) for infringing parental wishes and rights").

10. The authority of a State to exercise jurisdiction over a child in a child custody dispute when the child is physically present in a State and has been abandoned is also recognized by federal statute. See Parental Kidnaping Prevention Act of 1980, 94 Stat. 3569, 28 U.S.C. § 1738A(c)(2); see also Uniform Child Custody Jurisdiction Act, 9 U.L.A. § 3 (1988).

11. The Court suggests that there could be no legally effective abandonment because the parents consented to termination of their parental rights before a judge of the state court and not a tribal court judge. *Ante*, at 51,

n. 26. That suggestion ignores the findings of the State Supreme Court that the natural parents did virtually everything they could do to abandon the children to persons outside the reservation: "[T]he Indian twins have never resided outside of Harrison County, Mississippi, and were voluntarily surrendered and legally abandoned by the natural parents to the adoptive parents, and it is undisputed that the parents went to some efforts to prevent the children from being placed on the reservation as the mother arranged for their birth and adoption in Gulfport Memorial Hospital, Harrison County, Mississippi." 511 So.2d 918, 921 (1987). In any event, even a consent to adoption that does not meet statutory requirements may be effective to constitute an abandonment and change the minor's domicile. See *Wilson v. Pierce*, 14 Utah 2d 317, 321, 383 P.2d 925, 927 (1963); H. Clark, *Law of Domestic Relations in the United States* 633 (1968).

<sup>12</sup>. The facts of *In re Adoption of Halloway*, 732 P.2d 962 (Utah 1986), which the Court cites approvingly, *ante*, at 52-53, vividly illustrate the problem. In that case, the mother, a member of an Indian Tribe in New Mexico, voluntarily abandoned an Indian child to the custody of the child's maternal aunt off the reservation with the knowledge that the child would be placed for adoption in Utah. The mother learned of the adoption two weeks after the child left the reservation and did not object and, two months later, she executed a consent to adoption. Nevertheless, some two years after the petition for adoption was filed, the Indian Tribe intervened in the proceeding and set aside the adoption. The Tribe argued successfully that regardless of whether the Indian parent consented to it, the adoption was void because she resided on the reservation and thus the tribal court had exclusive jurisdiction. Although the decision in *Halloway*, and the Court's approving reference to it, may be colored somewhat by the fact that the mother in that case withdrew her consent (a fact which would entitle her to

relief even if there were only concurrent jurisdiction, see 25 U.S.C. § 1913(c)), the rule set forth by the majority contains no such limitation. As the Tribe acknowledged at oral argument, any adoption of an Indian child effected through a state court will be susceptible of challenge by the Indian tribe no matter how old the child and how long it has lived with its adoptive parents. Tr. of Oral Arg. 15.



**133 S.Ct. 2552  
186 L.Ed.2d 729  
81 USLW 4590**

**ADOPTIVE COUPLE, Petitioners  
v.  
BABY GIRL, a minor child under the  
age of fourteen years, et al.**

**No. 12–399.**

**Supreme Court of the United States**

**Argued April 16, 2013.  
Decided June 25, 2013.**

[133 S.Ct. 2554]

***Syllabus\****

The Indian Child Welfare Act of 1978 (ICWA), which establishes federal standards for state-court child custody proceedings involving Indian children, was enacted to address “the consequences ... of abusive child welfare practices that [separated] Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes,” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32, 109 S.Ct. 1597, 104 L.Ed.2d 29. As relevant here, the ICWA bars involuntary termination of a parent's rights in the absence of a heightened showing that serious harm to the Indian child is likely to result from the parent's “continued custody” of the child, 25 U.S.C. § 1912(f); conditions involuntary termination of parental rights with respect to an Indian child on a showing that remedial efforts have been made to prevent the “breakup of the Indian family,” § 1912(d); and provides placement preferences for the adoption of Indian children to members of the child's extended family, other members of

the Indian child's tribe, and other Indian families, § 1915(a).

While Birth Mother was pregnant with Biological Father's child, their relationship ended and Biological Father (a member of the Cherokee Nation) agreed to relinquish his parental rights. Birth Mother put Baby Girl up for adoption through a private adoption agency and selected Adoptive Couple, non-Indians living in South Carolina. For the duration of the pregnancy and the first four months after Baby Girl's birth, Biological Father provided no financial assistance to Birth Mother or Baby Girl. About four months after Baby Girl's birth, Adoptive Couple served Biological Father with notice of the pending adoption. In the adoption proceedings, Biological Father sought custody and stated that he did not consent to the adoption. Following a trial, which took place

[133 S.Ct. 2555]

when Baby Girl was two years old, the South Carolina Family Court denied Adoptive Couple's adoption petition and awarded custody to Biological Father. At the age of 27 months, Baby Girl was handed over to Biological Father, whom she had never met. The State Supreme Court affirmed, concluding that the ICWA applied because the child custody proceeding related to an Indian child; that Biological Father was a “parent” under the ICWA; that §§ 1912(d) and (f) barred the termination of his parental rights; and that had his rights been terminated, § 1915(a)'s adoption-placement preferences would have applied.

*Held*:

1. Assuming for the sake of argument that Biological Father is a “parent” under the ICWA, neither § 1912(f) nor § 1912(d) bars the termination of his parental rights. Pp. 2559 – 2564.

(a) Section 1912(f) conditions the involuntary termination of parental rights on a heightened showing regarding the merits of the parent's "continued custody of the child." The adjective "continued" plainly refers to a pre-existing state under ordinary dictionary definitions. The phrase "continued custody" thus refers to custody that a parent already has (or at least had at some point in the past). As a result, § 1912(f) does not apply where the Indian parent *never* had custody of the Indian child. This reading comports with the statutory text, which demonstrates that the ICWA was designed primarily to counteract the unwarranted *removal* of Indian children from Indian families. See § 1901(4). But the ICWA's primary goal is not implicated when an Indian child's adoption is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights. Nonbinding guidelines issued by the Bureau of Indian Affairs (BIA) demonstrate that the BIA envisioned that § 1912(f)'s standard would apply only to termination of a *custodial* parent's rights. Under this reading, Biological Father should not have been able to invoke § 1912(f) in this case because he had never had legal or physical custody of Baby Girl as of the time of the adoption proceedings. Pp. 2559 – 2562.

(b) Section § 1912(d) conditions an involuntary termination of parental rights with respect to an Indian child on a showing "that active efforts have been made to provide remedial services ... designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." Consistent with this text, § 1912(d) applies only when an Indian family's "breakup" would be precipitated by terminating parental rights. The term "breakup" refers in this context to "[t]he discontinuance of a relationship," American Heritage Dictionary 235 (3d ed. 1992), or "an ending as an effective entity," Webster's Third New International Dictionary 273 (1961). But when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no

"relationship" to be "discontinu[ed]" and no "effective entity" to be "end[ed]" by terminating the Indian parent's rights. In such a situation, the "breakup of the Indian family" has long since occurred, and § 1912(d) is inapplicable. This interpretation is consistent with the explicit congressional purpose of setting certain "standards for the removal of Indian children from their families," § 1902, and with BIA Guidelines. Section 1912(d)'s proximity to §§ 1912(e) and (f), which both condition the outcome of proceedings on the merits of an Indian child's "continued custody" with his parent, strongly suggests that the phrase "breakup of the Indian family" should be read in harmony with the "continued custody" requirement. Pp. 2562 – 2564.

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2. Section 1915(a)'s adoption-placement preferences are inapplicable in cases where no alternative party has formally sought to adopt the child. No party other than Adoptive Couple sought to adopt Baby Girl in the Family Court or the South Carolina Supreme Court. Biological Father is not covered by § 1915(a) because he did not seek to adopt Baby Girl; instead, he argued that his parental rights should not be terminated in the first place. And custody was never sought by Baby Girl's paternal grandparents, other members of the Cherokee Nation, or other Indian families. Pp. 2563 – 2565.

398 S.C. 625, 731 S.E.2d 550, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, and BREYER, JJ., joined. THOMAS, J., and BREYER, J., filed concurring opinions. SCALIA, J., filed a dissenting opinion. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG and KAGAN, JJ., joined, and in which SCALIA, J., joined in part.

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Paul D. Clement, Washington, DC, for Respondent Guardian ad Litem in support of the Petitioners.

Charles A. Rothfeld, Washington, DC, for Respondents Birth Father, et al.

Edwin S. Kneedler, for the United States as amicus curiae, by special leave of the Court, supporting the Respondents Birth Father, et al.

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Lloyd B. Miller, William R. Perry, Anne D. Noto, Colin Cloud Hampson, Sonosky, Chambers, Sachse, Endreson & Perry, LLP, Washington, DC, Carter G. Phillips, Sidley Austin LLP, Washington, DC, Todd Hembree, Attorney General, Chrissi Ross Nimmo, Assistant Attorney General, Counsel of Record, Cherokee Nation, Tahlequah, OK, for Respondent Cherokee Nation.

## **Justice ALITO delivered the opinion of the Court.**

This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee. Because Baby Girl is classified in this way, the South Carolina Supreme Court held that certain provisions of the federal Indian Child Welfare Act of 1978 required her to be taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological father, who had attempted to relinquish his parental rights and who had no prior contact with the child. The provisions of the federal statute

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at issue here do not demand this result.

Contrary to the State Supreme Court's ruling, we hold that 25 U.S.C. § 1912(f)—which bars involuntary termination of a parent's rights in the absence of a heightened showing that serious harm to the Indian child is likely to result from the parent's “continued custody” of the child—does not apply when, as here, the relevant parent never had custody of the child. We further hold that § 1912(d)—which conditions involuntary termination of parental rights with respect to an Indian child on a showing that remedial efforts have been made to prevent the “breakup of the Indian family”—is inapplicable when, as here, the parent abandoned the Indian child before birth and never had custody of the child. Finally, we clarify that § 1915(a), which provides placement preferences for the adoption of Indian children, does not bar a non-Indian family like Adoptive Couple from adopting an Indian child when no other eligible candidates have sought to adopt the child. We accordingly reverse the South Carolina Supreme Court's judgment and remand for further proceedings.

**I**

“The Indian Child Welfare Act of 1978 (ICWA), 92 Stat. 3069, 25 U.S.C. §§ 1901–1963, was the product of rising concern in the mid–1970’s over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). Congress found that “an alarmingly high percentage of Indian families [were being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.” § 1901(4). This “wholesale removal of Indian children from their homes” prompted Congress to enact the ICWA, which establishes federal standards that govern state-court child custody proceedings involving Indian children. *Id.*, at 32, 36, 109 S.Ct. 1597 (internal quotation marks omitted); see also § 1902 (declaring that the ICWA establishes “minimum Federal standards for the removal of Indian children from their families”).<sup>1</sup>

Three provisions of the ICWA are especially relevant to this case. *First*, “[a]ny party seeking” an involuntary termination of parental rights to an Indian child under state law must demonstrate that “active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.” § 1912(d). *Second*, a state court may not involuntarily terminate parental rights to an Indian child “in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is

[133 S.Ct. 2558]

likely to result in serious emotional or physical damage to the child.” § 1912(f). *Third*, with respect to adoptive placements for an Indian child under state law, “a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.” § 1915(a).

## II

In this case, Birth Mother (who is predominantly Hispanic) and Biological Father (who is a member of the Cherokee Nation) became engaged in December 2008. One month later, Birth Mother informed Biological Father, who lived about four hours away, that she was pregnant. After learning of the pregnancy, Biological Father asked Birth Mother to move up the date of the wedding. He also refused to provide any financial support until after the two had married. The couple’s relationship deteriorated, and Birth Mother broke off the engagement in May 2009. In June, Birth Mother sent Biological Father a text message asking if he would rather pay child support or relinquish his parental rights. Biological Father responded via text message that he relinquished his rights.

Birth Mother then decided to put Baby Girl up for adoption. Because Birth Mother believed that Biological Father had Cherokee Indian heritage, her attorney contacted the Cherokee Nation to determine whether Biological Father was formally enrolled. The inquiry letter misspelled Biological Father’s first name and incorrectly stated his birthday, and the Cherokee Nation responded that, based on the information provided, it could not verify Biological Father’s membership in the tribal records.

Working through a private adoption agency, Birth Mother selected Adoptive Couple, non-Indians living in South Carolina,

to adopt Baby Girl. Adoptive Couple supported Birth Mother both emotionally and financially throughout her pregnancy. Adoptive Couple was present at Baby Girl's birth in Oklahoma on September 15, 2009, and Adoptive Father even cut the umbilical cord. The next morning, Birth Mother signed forms relinquishing her parental rights and consenting to the adoption. Adoptive Couple initiated adoption proceedings in South Carolina a few days later, and returned there with Baby Girl. After returning to South Carolina, Adoptive Couple allowed Birth Mother to visit and communicate with Baby Girl.

It is undisputed that, for the duration of the pregnancy and the first four months after Baby Girl's birth, Biological Father provided no financial assistance to Birth Mother or Baby Girl, even though he had the ability to do so. Indeed, Biological Father "made no meaningful attempts to assume his responsibility of parenthood" during this period. App. to Pet. for Cert. 122a (Sealed; internal quotation marks omitted).

Approximately four months after Baby Girl's birth, Adoptive Couple served Biological Father with notice of the pending adoption. (This was the first notification that they had provided to Biological Father regarding the adoption proceeding.) Biological Father signed papers stating that he accepted service and that he was "not contesting the adoption." App. 37. But Biological Father later testified that, at the time he signed the papers, he thought that he was relinquishing his rights to Birth Mother, not to Adoptive Couple.

Biological Father contacted a lawyer the day after signing the papers, and subsequently

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requested a stay of the adoption proceedings.<sup>2</sup> In the adoption proceedings, Biological

Father sought custody and stated that he did not consent to Baby Girl's adoption. Moreover, Biological Father took a paternity test, which verified that he was Baby Girl's biological father.

A trial took place in the South Carolina Family Court in September 2011, by which time Baby Girl was two years old. 398 S.C. 625, 634–635, 731 S.E.2d 550, 555–556 (2012). The Family Court concluded that Adoptive Couple had not carried the heightened burden under § 1912(f) of proving that Baby Girl would suffer serious emotional or physical damage if Biological Father had custody. See *id.*, at 648–651, 731 S.E.2d, at 562–564. The Family Court therefore denied Adoptive Couple's petition for adoption and awarded custody to Biological Father. *Id.*, at 629, 636, 731 S.E.2d, at 552, 556. On December 31, 2011, at the age of 27 months, Baby Girl was handed over to Biological Father, whom she had never met.<sup>3</sup>

The South Carolina Supreme Court affirmed the Family Court's denial of the adoption and the award of custody to Biological Father. *Id.*, at 629, 731 S.E.2d, at 552. The State Supreme Court first determined that the ICWA applied because the case involved a child custody proceeding relating to an Indian child. *Id.*, at 637, 643, n. 18, 731 S.E.2d, at 556, 560, n. 18. It also concluded that Biological Father fell within the ICWA's definition of a "parent." *Id.*, at 644, 731 S.E.2d, at 560. The court then held that two separate provisions of the ICWA barred the termination of Biological Father's parental rights. *First*, the court held that Adoptive Couple had not shown that "active efforts ha[d] been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." § 1912(d); see also *id.*, at 647–648, 731 S.E.2d, at 562. *Second*, the court concluded that Adoptive Couple had not shown that Biological Father's "custody of Baby Girl would result in serious emotional or physical harm to her beyond a reasonable doubt." *Id.*,

at 648–649, 731 S.E.2d, at 562–563 (citing § 1912(f)). Finally, the court stated that, even if it had decided to terminate Biological Father's parental rights, § 1915(a)'s adoption-placement preferences would have applied. *Id.*, at 655–657, 731 S.E.2d, at 566–567. We granted certiorari. 568 U.S. ———, 133 S.Ct. 831, 184 L.Ed.2d 646 (2013).

### III

It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law. See Tr. of Oral Arg. 49; 398 S.C., at 644, n. 19, 731 S.E.2d, at 560, n. 19 (“Under state law, [Biological] Father's consent to the adoption would not have been required”). The South Carolina Supreme Court held, however, that Biological Father is a “parent” under the ICWA and that two statutory provisions—namely, § 1912(f) and § 1912(d)—bar the termination of his parental rights. In this Court, Adoptive Couple contends that Biological Father is not a “parent” and that § 1912(f) and

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§ 1912(d) are inapplicable. We need not—and therefore do not—decide whether Biological Father is a “parent.” See § 1903(9) (defining “parent”).<sup>4</sup> Rather, assuming for the sake of argument that he is a “parent,” we hold that neither § 1912(f) nor § 1912(d) bars the termination of his parental rights.

### A

Section 1912(f) addresses the involuntary termination of parental rights with respect to an Indian child. Specifically, § 1912(f) provides that “[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, ... that the *continued custody* of the child by the parent or Indian custodian is likely to result

in serious emotional or physical damage to the child.” (Emphasis added.) The South Carolina Supreme Court held that Adoptive Couple failed to satisfy § 1912(f) because they did not make a heightened showing that Biological Father's “*prospective* legal and physical custody” would likely result in serious damage to the child. 398 S.C., at 651, 731 S.E.2d, at 564 (emphasis added). That holding was error.

Section 1912(f) conditions the involuntary termination of parental rights on a showing regarding the merits of “*continued* custody of the child by the parent.” (Emphasis added.) The adjective “continued” plainly refers to a pre-existing state. As Justice SOTOMAYOR concedes, *post*, at 2577 – 2578 (dissenting opinion) (hereinafter the dissent), “continued” means “[c]arried on or kept up without cessation” or “[e]xtended in space without interruption or breach of connection.” Compact Edition of the Oxford English Dictionary 909 (1981 reprint of 1971 ed.) (Compact OED); see also American Heritage Dictionary 288 (1981) (defining “continue” in the following manner: “1. To go on with a particular action or in a particular condition; persist.... 3. To remain in the same state, capacity, or place”); Webster's Third New International Dictionary 493 (1961) (Webster's) (defining “continued” as “stretching out in time or space esp. without interruption”); *Aguilar v. FDIC*, 63 F.3d 1059, 1062 (C.A.11 1995) ( *per curiam* ) (suggesting that the phrase “continue an action” means “go on with ... an action” that is “preexisting”). The term “continued” also can mean “resumed after interruption.” Webster's 493; see American Heritage Dictionary 288. The phrase “continued custody” therefore refers to custody that a parent already has (or at least had at some point in the past). As a result, § 1912(f) does not apply in cases where the Indian parent *never* had custody of the Indian child.<sup>5</sup>

Biological Father's contrary reading of § 1912(f) is nonsensical. Pointing to the

provision's requirement that "[n]o termination of parental rights may be ordered ... in the absence of a determination" relating to "the continued custody of the

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child by the parent," Biological Father contends that if a determination relating to "continued custody" is inapposite in cases where there is no "custody," the statutory text *prohibits* termination. See Brief for Respondent Birth Father 39. But it would be absurd to think that Congress enacted a provision that *permits* termination of a custodial parent's rights, while simultaneously *prohibiting* termination of a noncustodial parent's rights. If the statute draws any distinction between custodial and noncustodial parents, that distinction surely does not provide greater protection for noncustodial parents.<sup>6</sup>

Our reading of § 1912(f) comports with the statutory text demonstrating that the primary mischief the ICWA was designed to counteract was the unwarranted *removal* of Indian children from Indian families due to the cultural insensitivity and biases of social workers and state courts. The statutory text expressly highlights the primary problem that the statute was intended to solve: "an alarmingly high percentage of Indian families [were being] broken up by the *removal*, often unwarranted, of their children from them by nontribal public and private agencies." § 1901(4) (emphasis added); see also § 1902 (explaining that the ICWA establishes "minimum Federal standards for the *removal* of Indian children from their families" (emphasis added)); *Holyfield*, 490 U.S., at 32–34, 109 S.Ct. 1597. And if the legislative history of the ICWA is thought to be relevant, it further underscores that the Act was primarily intended to stem the unwarranted removal of Indian children from intact Indian families. See, e.g., H.R.Rep. No. 95–1386, p. 8 (1978) (explaining that, as relevant here, "[t]he purpose of [the ICWA] is to protect the

best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the *removal* of Indian children from their families and the placement of such children in foster or adoptive homes" (emphasis added)); *id.*, at 9 (decrying the "wholesale separation of Indian children" from their Indian families); *id.*, at 22 (discussing "the removal" of Indian children from their parents pursuant to §§ 1912(e) and (f)). In sum, when, as here, the adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights, the ICWA's primary goal of preventing the unwarranted removal of Indian children and the dissolution of Indian families is not implicated.

The dissent fails to dispute that nonbinding guidelines issued by the Bureau of Indian Affairs (BIA) shortly after the ICWA's enactment demonstrate that the BIA envisioned that § 1912(f)'s standard would apply only to termination of a *custodial* parent's rights. Specifically, the BIA stated that, under § 1912(f), "[a] child may not be *removed* simply because there is someone else willing to raise the child who is likely to do a better job"; instead, "[i]t must be shown that ... it is dangerous for the child to *remain* with his or her *present* custodians." Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed.Reg. 67593 (1979) (emphasis added) (hereinafter Guidelines). Indeed, the Guidelines recognized that § 1912(f) applies only when there is pre-existing custody to evaluate.

[133 S.Ct. 2562]

See *ibid.* ("[T]he issue on which qualified expert testimony is required is the question of whether or not serious damage to the child is likely to occur if the child is not removed").

Under our reading of § 1912(f), Biological Father should not have been able to invoke § 1912(f) in this case, because he had never had

legal or physical custody of Baby Girl as of the time of the adoption proceedings. As an initial matter, it is undisputed that Biological Father never had *physical* custody of Baby Girl. And as a matter of both South Carolina and Oklahoma law, Biological Father never had *legal* custody either. See S.C.Code Ann. § 63–17–20(B) (2010) (“Unless the court orders otherwise, the custody of an illegitimate child is solely in the natural mother unless the mother has relinquished her rights to the child”); Okla. Stat., Tit. 10, § 7800 (West Cum.Supp. 2013) (“Except as otherwise provided by law, the mother of a child born out of wedlock has custody of the child until determined otherwise by a court of competent jurisdiction”).<sup>7</sup>

In sum, the South Carolina Supreme Court erred in finding that § 1912(f) barred termination of Biological Father's parental rights.

## B

Section 1912(d) provides that “[a]ny party” seeking to terminate parental rights to an Indian child under state law “shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed *to prevent the breakup of the Indian family* and that these efforts have proved unsuccessful.” (Emphasis added.) The South Carolina Supreme Court found that Biological Father's parental rights could not be terminated because Adoptive Couple had not demonstrated that Biological Father had been provided remedial services in accordance with § 1912(d). 398 S.C., at 647–648, 731 S.E.2d, at 562. We disagree.

Consistent with the statutory text, we hold that § 1912(d) applies only in cases where an Indian family's “breakup” would be precipitated by the termination of the parent's rights. The term “breakup” refers in this context to “[t]he discontinuance of a relationship,” American Heritage Dictionary

235 (3d ed. 1992), or “an ending as an effective entity,” Webster's 273 (defining “breakup” as “a disruption or dissolution into component parts: an ending as an effective entity”). See also Compact OED 1076 (defining “break-up” as, *inter alia*, a “disruption, separation into parts, disintegration”). But when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no “relationship” that would be “discontinu[ed]”—and no “effective entity” that would be “end[ed]”—by the termination of the Indian parent's rights. In such a situation, the “breakup of the Indian family” has long since occurred, and § 1912(d) is inapplicable.

[133 S.Ct. 2563]

Our interpretation of § 1912(d) is, like our interpretation of § 1912(f), consistent with the explicit congressional purpose of providing certain “standards for the *removal* of Indian children from their families.” § 1902 (emphasis added); see also, *e.g.*, § 1901(4); *Holyfield*, 490 U.S., at 32–34, 109 S.Ct. 1597. In addition, the BIA's Guidelines confirm that remedial services under § 1912(d) are intended “to alleviate the need to *remove* the Indian child from his or her parents or Indian custodians,” not to facilitate a *transfer* of the child to an Indian parent. See 44 Fed.Reg., at 67592 (emphasis added).

Our interpretation of § 1912(d) is also confirmed by the provision's placement next to § 1912(e) and § 1912(f), both of which condition the outcome of proceedings on the merits of an Indian child's “continued custody” with his parent. That these three provisions appear adjacent to each other strongly suggests that the phrase “breakup of the Indian family” should be read in harmony with the “continued custody” requirement. See *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988)

(explaining that statutory construction “is a holistic endeavor” and that “[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme”). None of these three provisions *creates* parental rights for unwed fathers where no such rights would otherwise exist. Instead, Indian parents who are already part of an “Indian family” are provided with access to “remedial services and rehabilitative programs” under § 1912(d) so that their “custody” might be “continued” in a way that avoids foster-care placement under § 1912(e) or termination of parental rights under § 1912(f). In other words, the provision of “remedial services and rehabilitative programs” under § 1912(d) supports the “continued custody” that is protected by § 1912(e) and § 1912(f).<sup>8</sup>

Section 1912(d) is a sensible requirement when applied to state social workers who might otherwise be too quick to remove Indian children from their Indian families. It would, however, be unusual to apply § 1912(d) in the context of an Indian parent who abandoned a child prior to birth and who never had custody of the child. The decision below illustrates this point. The South Carolina Supreme Court held that § 1912(d) mandated measures such as “attempting to stimulate [Biological] Father's desire to be a parent.” 398 S.C., at 647, 731 S.E.2d, at 562. But if prospective adoptive parents were required to engage in the bizarre undertaking of “stimulat[ing]” a biological father's “desire to be a parent,” it would surely dissuade some of them from seeking to

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adopt Indian children.<sup>9</sup> And this would, in turn, unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home, even in cases where neither an Indian parent nor the relevant tribe objects to the adoption.<sup>10</sup>

In sum, the South Carolina Supreme Court erred in finding that § 1912(d) barred termination of Biological Father's parental rights.

#### IV

In the decision below, the South Carolina Supreme Court suggested that if it had terminated Biological Father's rights, then § 1915(a)'s preferences for the adoptive placement of an Indian child would have been applicable. 398 S.C., at 655–657, 731 S.E.2d, at 566–567. In so doing, however, the court failed to recognize a critical limitation on the scope of § 1915(a).

Section 1915(a) provides that “[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.” Contrary to the South Carolina Supreme Court's suggestion, § 1915(a)'s preferences are inapplicable in cases where no alternative party has formally sought to adopt the child. This is because there simply is no “preference” to apply if no alternative party that is eligible to be preferred under § 1915(a) has come forward.

In this case, Adoptive Couple was the only party that sought to adopt Baby Girl in the Family Court or the South Carolina Supreme Court. See Brief for Petitioners 19, 55; Brief for Respondent Birth Father 48; Reply Brief for Petitioners 13. Biological Father is not covered by § 1915(a) because he did not seek to *adopt* Baby Girl; instead, he argued that his parental rights should not be terminated in the first place.<sup>11</sup> Moreover, Baby Girl's paternal grandparents never sought custody of Baby Girl. See Brief for Petitioners 55; Reply Brief for Petitioners 13; 398 S.C., at 699, 731 S.E.2d, at 590 (Kittredge, J., dissenting) (noting that the “paternal grandparents are not parties to this

action”). Nor did other members of the Cherokee Nation or “other Indian families” seek to adopt Baby Girl, even though the Cherokee Nation had notice of—and intervened in—the adoption proceedings. See Brief

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for Respondent Cherokee Nation 21–22; Reply Brief for Petitioners 13–14.<sup>12</sup>

The Indian Child Welfare Act was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the State Supreme Court’s reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian. As the State Supreme Court read §§ 1912(d) and (f), a biological Indian father could abandon his child *in utero* and refuse any support for the birth mother—perhaps contributing to the mother’s decision to put the child up for adoption—and then could play his ICWA trump card at the eleventh hour to override the mother’s decision and the child’s best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA. Such an interpretation would raise equal protection concerns, but the plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context. Nor do § 1915(a)’s rebuttable adoption preferences apply when no alternative party has formally sought to adopt the child. We therefore reverse the judgment of the South Carolina Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

*It is so ordered.*

**Justice THOMAS, concurring.**

I join the Court’s opinion in full but write separately to explain why constitutional

avoidance compels this outcome. Each party in this case has put forward a plausible interpretation of the relevant sections of the Indian Child Welfare Act (ICWA). However, the interpretations offered by respondent Birth Father and the United States raise significant constitutional problems as applied to this case. Because the Court’s decision avoids those problems, I concur in its interpretation.

**I**

This case arises out of a contested state-court adoption proceeding. Adoption proceedings are adjudicated in state family courts across the country every day, and “domestic relations” is “an area that has long been regarded as a virtually exclusive province of the States.” *Sosna v. Iowa*, 419 U.S. 393, 404, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). Indeed, “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.” *In re Burrus*, 136 U.S. 586, 593–594, 10 S.Ct. 850, 34 L.Ed. 500 (1890). Nevertheless, when Adoptive Couple filed a petition in South Carolina Family Court to finalize their adoption of Baby Girl, Birth Father, who had relinquished his parental rights via a text message to Birth Mother, claimed a federal right under the ICWA to block the adoption and to obtain custody.

The ICWA establishes “federal standards that govern state-court child custody proceedings involving Indian children.” *Ante*, at 2557. The ICWA defines “Indian child” as “any unmarried person who is under age eighteen and is either (a) a

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member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” 25 U.S.C. § 1903(4). As relevant, the ICWA defines “child custody proceeding,” §

1903(1), to include “adoptive placement,” which means “the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption,” § 1903(1)(iv), and “termination of parental rights,” which means “any action resulting in the termination of the parent-child relationship,” § 1903(1)(ii).

The ICWA restricts a state court's ability to terminate the parental rights of an Indian parent in two relevant ways. Section 1912(f) prohibits a state court from involuntarily terminating parental rights “in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” Section 1912(d) prohibits a state court from terminating parental rights until the court is satisfied “that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.” A third provision creates specific placement preferences for the adoption of Indian children, which favor placement with Indians over other adoptive families. § 1915(a). Operating together, these requirements often lead to different outcomes than would result under state law. That is precisely what happened here. See *ante*, at 2559 (“It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law”).

The ICWA recognizes States' inherent “jurisdiction over Indian child custody proceedings,” § 1901(5), but asserts that federal regulation is necessary because States “have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families,” *ibid.* However, Congress may regulate areas of

traditional state concern only if the Constitution grants it such power. Admt. 10 (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”). The threshold question, then, is whether the Constitution grants Congress power to override state custody law whenever an Indian is involved.

## II

The ICWA asserts that the Indian Commerce Clause, Art. I, § 8, cl. 3, and “other constitutional authority” provides Congress with “plenary power over Indian affairs.” § 1901(1). The reference to “other constitutional authority” is not illuminating, and I am aware of no other enumerated power that could even arguably support Congress' intrusion into this area of traditional state authority. See Fletcher, *The Supreme Court and Federal Indian Policy*, 85 Neb. L.Rev. 121, 137 (2006) (“As a matter of federal constitutional law, the Indian Commerce Clause grants Congress the only explicit constitutional authority to deal with Indian tribes”); Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U.L.Rev. 201, 210 (2007) (hereinafter Natelson) (evaluating, and rejecting, other potential sources of authority supporting congressional power over Indians). The assertion of plenary authority must, therefore, stand or fall on Congress' power under the Indian Commerce Clause. Although this Court has said that the “central function of

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the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs,” *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989), neither the text nor the original understanding of the Clause supports Congress' claim to such “plenary” power.

## A

The Indian Commerce Clause gives Congress authority “[t]o regulate *Commerce* ... with the Indian tribes.” Art. I, § 8, cl. 3 (emphasis added). “At the time the original Constitution was ratified, ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes.” *United States v. Lopez*, 514 U.S. 549, 585, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (THOMAS, J., concurring). See also 1 S. Johnson, *A Dictionary of the English Language* 361 (4th rev. ed. 1773) (reprint 1978) (defining commerce as “Intercourse; exchange of one thing for another; interchange of any thing; trade; traffick”). “[W]hen Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably.” *Lopez, supra*, at 586, 115 S.Ct. 1624 (THOMAS, J., concurring). The term “commerce” did not include economic activity such as “manufacturing and agriculture,” *ibid.*, let alone noneconomic activity such as adoption of children.

Furthermore, the term “commerce with Indian tribes” was invariably used during the time of the founding to mean “ ‘trade with Indians.’ ” See, e.g., Natelson, 215–216, and n. 97 (citing 18th-century sources); Report of Committee on Indian Affairs (Feb. 20, 1787), in 32 *Journals of the Continental Congress 1774–1789*, pp. 66, 68 (R. Hill ed. 1936) (hereinafter *J. Cont’l Cong.*) (using the phrase “commerce with the Indians” to mean trade with the Indians). And regulation of Indian commerce generally referred to legal structures governing “the conduct of the merchants engaged in the Indian trade, the nature of the goods they sold, the prices charged, and similar matters.” Natelson 216, and n. 99.

The Indian Commerce Clause contains an additional textual limitation relevant to this case: Congress is given the power to regulate

Commerce “with the Indian *tribes*.” The Clause does not give Congress the power to regulate commerce with all Indian *persons* any more than the Foreign Commerce Clause gives Congress the power to regulate commerce with all foreign nationals traveling within the United States. A straightforward reading of the text, thus, confirms that Congress may only regulate commercial interactions—“commerce”—taking place with established Indian communities—“tribes.” That power is far from “plenary.”

## B

Congress’ assertion of “plenary power” over Indian affairs is also inconsistent with the history of the Indian Commerce Clause. At the time of the founding, the Clause was understood to reserve to the States general police powers with respect to Indians who were citizens of the several States. The Clause instead conferred on Congress the much narrower power to regulate trade with Indian tribes—that is, Indians who had not been incorporated into the body-politic of any State.

## 1

Before the Revolution, most Colonies adopted their own regulations governing Indian trade. See Natelson 219, and n. 121 (citing colonial laws). Such regulations were necessary because colonial traders all too often abused their Indian trading partners, through fraud, exorbitant

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prices, extortion, and physical invasion of Indian territory, among other things. See 1 F. Prucha, *The Great Father* 18–20 (1984) (hereinafter *Prucha*); Natelson 220, and n. 122. These abuses sometimes provoked violent Indian retaliation. See *Prucha* 20. To mitigate these conflicts, most Colonies extensively regulated traders engaged in commerce with Indian tribes. See e.g.,

Ordinance to Regulate Indian Affairs, Statutes of South Carolina (Aug. 31, 1751), in 16 Early American Indian Documents: Treaties and Laws, 1607–1789, pp. 331–334 (A. Vaughan and D. Rosen eds. 1998).<sup>1</sup> Over time, commercial regulation at the colonial level proved largely ineffective, in part because “[t]here was no uniformity among the colonies, no two sets of like regulations.” Prucha 21.

Recognizing the need for uniform regulation of trade with the Indians, Benjamin Franklin proposed his own “articles of confederation” to the Continental Congress on July 21, 1775, which reflected his view that central control over Indian affairs should predominate over local control. 2 J. Cont’l Cong. 195–199 (W. Ford ed. 1905). Franklin’s proposal was not enacted, but in November 1775, Congress empowered a committee to draft regulations for the Indian trade. 3 *id.*, at 364, 366. On July 12, 1776, the committee submitted a draft of the Articles of Confederation to Congress, which incorporated many of Franklin’s proposals. 5 *id.*, at 545, 546, n. 1. The draft prohibited States from waging offensive war against the Indians without congressional authorization and granted Congress the exclusive power to acquire land from the Indians outside state boundaries, once those boundaries had been established. *Id.*, at 549. This version also gave Congress “the sole and exclusive Right and Power of ... Regulating the Trade, and managing all Affairs with the Indians.” *Id.* at 550.

On August 20, 1776, the Committee of the Whole presented to Congress a revised draft, which provided Congress with “the sole and exclusive right and power of ... regulating the trade, and managing all affairs with the Indians.” *Id.*, at 672, 681–682. Some delegates feared that the Articles gave Congress excessive power to interfere with States’ jurisdiction over affairs with Indians residing within state boundaries. After further deliberation, the final result was a clause that

included a broad grant of congressional authority with two significant exceptions: “The United States in Congress assembled shall also have the sole and exclusive right and power of ... regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated.” Articles of Confederation, Art. IX, cl. 4. As a result, Congress retained exclusive jurisdiction over Indian affairs outside the borders of the States; the States retained exclusive jurisdiction over relations with Member–Indians; <sup>2</sup> and Congress and

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the States “exercise[d] concurrent jurisdiction over transactions with tribal Indians within state boundaries, but congressional decisions would have to be in compliance with local law.” Natelson 230. The drafting of the Articles of Confederation reveals the delegates’ concern with protecting the power of the States to regulate Indian persons who were politically incorporated into the States. This concern for state power reemerged during the drafting of the Constitution.

## 2

The drafting history of the Constitutional Convention also supports a limited construction of the Indian Commerce Clause. On July 24, 1787, the convention elected a drafting committee—the Committee of Detail—and charged it to “report a Constitution conformable to the Resolutions passed by the Convention.” 2 Records of the Federal Convention of 1787, p. 106 (M. Farrand rev. 1966) (J. Madison). During the Committee’s deliberations, John Rutledge, the chairman, suggested incorporating an Indian affairs power into the Constitution. *Id.*, at 137, n. 6, 143. The first draft reported back to the convention, however, provided Congress with authority “[t]o regulate commerce with foreign nations, and among

the several States,” *id.*, at 181 (Madison) (Aug. 6, 1787), but did not include any specific Indian affairs clause. On August 18, James Madison proposed that the Federal Government be granted several additional powers, including the power “[t]o regulate *affairs* with the Indians as well within as without the limits of the U. States.” *Id.*, at 324 (J. Madison) (emphasis added). On August 22, Rutledge delivered the Committee of Detail’s second report, which modified Madison’s proposed clause. The Committee proposed to add to Congress’ power “[t]o regulate commerce with foreign nations, and among the several States” the words, “and with Indians, within the Limits of any State, not subject to the laws thereof.” *Id.*, at 366–367 (Journal). The Committee’s version, which echoed the Articles of Confederation, was far narrower than Madison’s proposal. On August 31, the revised draft was submitted to a Committee of Eleven for further action. *Id.*, at 473 (Journal), 481 (J. Madison). That Committee recommended adding to the Commerce Clause the phrase, “and with the Indian tribes,” *id.*, at 493, which the Convention ultimately adopted.

It is, thus, clear that the Framers of the Constitution were alert to the difference between the power to regulate trade with the Indians and the power to regulate all Indian affairs. By limiting Congress’ power to the former, the Framers declined to grant Congress the same broad powers over Indian affairs conferred by the Articles of Confederation. See Prakash, *Against Tribal Fungibility*, 89 *Cornell L.Rev.* 1069, 1090 (2004).

During the ratification debates, opposition to the Indian Commerce Clause was nearly nonexistent. See Natelson 248 (noting that Robert Yates, a New York Anti-Federalist was “almost the only writer who objected to any part [of] of the Commerce Clause—a clear indication that its scope was understood to be fairly narrow” (footnote omitted)). Given the Anti-Federalists’

vehement opposition to the Constitution’s other grants of power to the Federal Government, this silence is revealing. The ratifiers almost certainly understood the Clause to confer a relatively modest power on Congress—namely, the power to regulate trade with Indian tribes living beyond state borders. And this feature of the Constitution was welcomed by Federalists and Anti-Federalists alike due to the considerable interest in expanding trade with such Indian tribes. See, *e.g.*, *The Federalist* No. 42, at 265 (J. Madison)

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(praising the Constitution for removing the obstacles that had existed under the Articles of Confederation to federal control over “*trade with Indians*” (emphasis added)); 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 580 (2d ed. 1863) (Adam Stephens, at the Virginia ratifying convention, June 23, 1788, describing the Indian tribes residing near the Mississippi and “the variety of articles which might be obtained to advantage by trading with these people”); *The Federalist* No. 24, at 158 (A. Hamilton) (arguing that frontier garrisons would “be keys to the trade with the Indian nations”); Brutus, (Letter) X, *N.Y. J.*, Jan. 24, 1788, in 15 *The Documentary History of the Ratification of the Constitution* 462, 465 (J. Kaminski & G. Saladino eds. 2012) (conceding that there must be a standing army for some purposes, including “trade with Indians”). There is little evidence that the ratifiers of the Constitution understood the Indian Commerce Clause to confer anything resembling plenary power over Indian affairs. See Natelson 247–250.

### III

In light of the original understanding of the Indian Commerce Clause, the constitutional problems that would be created by application of the ICWA here are evident. First, the statute deals with “child custody

proceedings,” § 1903(1), not “commerce.” It was enacted in response to concerns that “an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.” § 1901(4). The perceived problem was that many Indian children were “placed in non-Indian foster and adoptive homes and institutions.” *Ibid.* This problem, however, had nothing to do with commerce.

Second, the portions of the ICWA at issue here do not regulate Indian tribes as tribes. Sections 1912(d) and (f), and § 1915(a) apply to all child custody proceedings involving an Indian child, regardless of whether an Indian tribe is involved. This case thus does not directly implicate Congress’ power to “legislate in respect to Indian *tribes*.” *United States v. Lara*, 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) (emphasis added). Baby Girl was never domiciled on an Indian Reservation, and the Cherokee Nation had no jurisdiction over her. Cf. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53–54, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989) (holding that the Indian Tribe had exclusive jurisdiction over child custody proceedings, even though the children were born off the reservation, because the children were “domiciled” on the reservation for purposes of the ICWA). Although Birth Father is a registered member of The Cherokee Nation, he did not live on a reservation either. He was, thus, subject to the laws of the State in which he resided (Oklahoma) and of the State where his daughter resided during the custody proceedings (South Carolina). Nothing in the Indian Commerce Clause permits Congress to enact special laws applicable to Birth Father merely because of his status as an Indian.<sup>3</sup>

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Because adoption proceedings like this one involve neither “commerce” nor “Indian tribes,” there is simply no constitutional basis

for Congress’ assertion of authority over such proceedings. Also, the notion that Congress can direct state courts to apply different rules of evidence and procedure merely because a person of Indian descent is involved raises absurd possibilities. Such plenary power would allow Congress to dictate specific rules of criminal procedure for state-court prosecutions against Indian defendants. Likewise, it would allow Congress to substitute federal law for state law when contract disputes involve Indians. But the Constitution does not grant Congress power to override state law whenever that law happens to be applied to Indians. Accordingly, application of the ICWA to these child custody proceedings would be unconstitutional.

\* \* \*

Because the Court’s plausible interpretation of the relevant sections of the ICWA avoids these constitutional problems, I concur.

**Justice BREYER, concurring.**

I join the Court’s opinion with three observations. First, the statute does not directly explain how to treat an absentee Indian father who had next-to-no involvement with his child in the first few months of her life. That category of fathers may include some who would prove highly unsuitable parents, some who would be suitable, and a range of others in between. Most of those who fall within that category seem to fall outside the scope of the language of 25 U.S.C. §§ 1912(d) and (f). Thus, while I agree that the better reading of the statute is, as the majority concludes, to exclude most of those fathers, *ante*, at 2569, 2571, I also understand the risk that, from a policy perspective, the Court’s interpretation could prove to exclude too many. See *post*, at 2578, 2583 – 2584 (SOTOMAYOR, J., dissenting).

Second, we should decide here no more than is necessary. Thus, this case does not involve a father with visitation rights or a father who has paid “all of his child support obligations.” See *post*, at 2578. Neither does it involve special circumstances such as a father who was deceived about the existence of the child or a father who was prevented from supporting his child. See *post*, at 2578 – 2579 n. 8. The Court need not, and in my view does not, now decide whether or how §§ 1912(d) and (f) apply where those circumstances are present.

Third, other statutory provisions not now before us may nonetheless prove relevant in cases of this kind. Section 1915(a) grants an adoptive “preference” to “(1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.... in the absence of good cause to the contrary.” Further, § 1915(c) allows the “Indian child’s tribe” to “establish a different order of preference by resolution.” Could these provisions allow an absentee father to reenter the special statutory order of preference with support from the tribe, and subject to a court’s consideration of “good cause?” I raise, but do not here try to answer, the question.

**Justice SCALIA, dissenting.**

I join Justice SOTOMAYOR’s dissent except as to one detail. I reject the conclusion that the Court draws from the words “continued custody” in 25 U.S. C § 1912(f) not because “literalness may strangle meaning,” see *post*, at 2577, but because there is no reason that “continued” must refer to custody in the past rather than custody in the future. I read the provision as requiring the court to satisfy itself (beyond a reasonable doubt)

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not merely that initial or temporary custody is not “likely to result in serious emotional or physical damage to the child,” but that

continued custody is not likely to do so. See Webster’s New International Dictionary 577 (2d ed. 1950) (defining “continued” as “[p]rotracted in time or space, esp. without interruption; constant”). For the reasons set forth in Justice SOTOMAYOR’s dissent, that connotation is much more in accord with the rest of the statute.

While I am at it, I will add one thought. The Court’s opinion, it seems to me, needlessly demeans the rights of parenthood. It has been the constant practice of the common law to respect the entitlement of those who bring a child into the world to raise that child. We do not inquire whether leaving a child with his parents is “in the best interest of the child.” It sometimes is not; he would be better off raised by someone else. But parents have their rights, no less than children do. This father wants to raise his daughter, and the statute amply protects his right to do so. There is no reason in law or policy to dilute that protection.

**Justice SOTOMAYOR, with whom Justice GINSBURG and Justice KAGAN join, and with whom Justice SCALIA joins in part, dissenting.**

A casual reader of the Court’s opinion could be forgiven for thinking this an easy case, one in which the text of the applicable statute clearly points the way to the only sensible result. In truth, however, the path from the text of the Indian Child Welfare Act of 1978 (ICWA) to the result the Court reaches is anything but clear, and its result anything but right.

The reader’s first clue that the majority’s supposedly straightforward reasoning is flawed is that not all Members who adopt its interpretation believe it is compelled by the text of the statute, see *ante*, at 2565 (THOMAS, J., concurring); nor are they all willing to accept the consequences it will necessarily have beyond the specific factual scenario confronted here, see *ante*, at 2571

(BREYER, J., concurring). The second clue is that the majority begins its analysis by plucking out of context a single phrase from the last clause of the last subsection of the relevant provision, and then builds its entire argument upon it. That is not how we ordinarily read statutes. The third clue is that the majority openly professes its aversion to Congress' explicitly stated purpose in enacting the statute. The majority expresses concern that reading the Act to mean what it says will make it more difficult to place Indian children in adoptive homes, see *ante*, at 2563 – 2564, 2564 – 2565, but the Congress that enacted the statute announced its intent to stop “an alarmingly high percentage of Indian families [from being] broken up” by, among other things, a trend of “plac[ing] [Indian children] in non-Indian ... adoptive homes.” 25 U.S.C. § 1901(4). Policy disagreement with Congress' judgment is not a valid reason for this Court to distort the provisions of the Act. Unlike the majority, I cannot adopt a reading of ICWA that is contrary to both its text and its stated purpose. I respectfully dissent.

## I

Beginning its reading with the last clause of § 1912(f), the majority concludes that a single phrase appearing there—“continued custody”—means that the entirety of the subsection is inapplicable to any parent, however committed, who has not previously had physical or legal custody of his child. Working back to front, the majority then concludes that § 1912(d), tainted by its association with § 1912(f), is also inapplicable; in the majority's view, a family bond that does not take custodial form is not a family bond worth preserving

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from “breakup.” Because there are apparently no limits on the contaminating power of this single phrase, the majority does not stop there. Under its reading, § 1903(9), which makes biological fathers “parent[s]” under

this federal statute (and where, again, the phrase “continued custody” does not appear), has substantive force only when a birth father has physical or state-recognized legal custody of his daughter.

When it excludes noncustodial biological fathers from the Act's substantive protections, this textually backward reading misapprehends ICWA's structure and scope. Moreover, notwithstanding the majority's focus on the perceived parental shortcomings of Birth Father, its reasoning necessarily extends to *all* Indian parents who have never had custody of their children, no matter how fully those parents have embraced the financial and emotional responsibilities of parenting. The majority thereby transforms a statute that was intended to provide uniform federal standards for child custody proceedings involving Indian children and their biological parents into an illogical piecemeal scheme.

## A

Better to start at the beginning and consider the operation of the statute as a whole. Cf. *ante*, at 2563 (“[S]tatutory construction ‘is a holistic endeavor[,]’ and ... ‘[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme’ ” (quoting *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988))).

ICWA commences with express findings. Congress recognized that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children,” 25 U.S.C. § 1901(3), and it found that this resource was threatened. State authorities insufficiently sensitive to “the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families” were breaking up Indian families and moving Indian children to non-Indian homes and

institutions. See §§ 1901(4)-(5). As § 1901(4) makes clear, and as this Court recognized in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989), adoptive placements of Indian children with non-Indian families contributed significantly to the overall problem. See § 1901(4) (finding that “an alarmingly high percentage of [Indian] children are placed in non-Indian ... adoptive homes”).

Consistent with these findings, Congress declared its purpose “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards” applicable to child custody proceedings involving Indian children. § 1902. Section 1903 then goes on to establish the reach of these protections through its definitional provisions. For present purposes, two of these definitions are crucial to understanding the statute's full scope.

First, ICWA defines the term “parent” broadly to mean “any biological parent ... of an Indian child or any Indian person who has lawfully adopted an Indian child.” § 1903(9). It is undisputed that Baby Girl is an “Indian child” within the meaning of the statute, see § 1903(4); *ante*, at 2557, n. 1, and Birth Father consequently qualifies as a “parent” under the Act. The statutory definition of parent “does not include the unwed father where paternity has not been acknowledged or established,” § 1903(9), but Birth Father's biological paternity has never been questioned by any party and was confirmed by a DNA test during the

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state court proceedings, App. to Pet. for Cert. 109a (Sealed).

Petitioners and Baby Girl's guardian ad litem devote many pages of briefing to arguing that the term “parent” should be

defined with reference to the law of the State in which an ICWA child custody proceeding takes place. See Brief for Petitioners 19–29; Brief for Respondent Guardian Ad Litem 32–41. These arguments, however, are inconsistent with our recognition in *Holyfield* that Congress intended the critical terms of the statute to have uniform federal definitions. See 490 U.S., at 44–45, 109 S.Ct. 1597. It is therefore unsurprising, although far from unimportant, that the majority assumes for the purposes of its analysis that Birth Father is an ICWA “parent.” See *ante*, at 2559 – 2560.

Second, the Act's comprehensive definition of “child custody proceeding” includes not only “‘adoptive placement[s],’ ” “‘preadoptive placement[s],’ ” and “‘foster care placement[s],’ ” but also “‘termination of parental rights’ ” proceedings. § 1903(1). This last category encompasses “any action resulting in the termination of the *parent-child relationship*,” § 1903(1)(ii) (emphasis added). So far, then, it is clear that Birth Father has a federally recognized status as Baby Girl's “parent” and that his “parent-child relationship” with her is subject to the protections of the Act.

These protections are numerous. Had Birth Father petitioned to remove this proceeding to tribal court, for example, the state court would have been obligated to transfer it absent an objection from Birth Mother or good cause to the contrary. See § 1911(b). Any voluntary consent Birth Father gave to Baby Girl's adoption would have been invalid unless written and executed before a judge and would have been revocable up to the time a final decree of adoption was entered.<sup>1</sup> See §§ 1913(a), (c). And § 1912, the center of the dispute here, sets forth procedural and substantive standards applicable in “involuntary proceeding[s] in a State court,” including foster care placements of Indian children and termination of parental rights proceedings. § 1912(a). I consider § 1912's provisions in order.

Section 1912(a) requires that any party seeking “termination of parental rights t[o] an Indian child” provide notice to both the child’s “parent or Indian custodian” and the child’s tribe “of the pending proceedings and of their right of intervention.” Section 1912(b) mandates that counsel be provided for an indigent “parent or Indian custodian” in any “termination proceeding.” Section 1912(c) also gives all “part[ies]” to a termination proceeding—which, thanks to §§ 1912(a) and (b), will always include a biological father if he desires to be present—the right to inspect all material “reports or other documents filed with the court.” By providing notice, counsel, and access to relevant documents, the statute ensures a biological father’s meaningful participation in an adoption proceeding where the termination of his parental rights is at issue.

These protections are consonant with the principle, recognized in our cases, that the biological bond between parent and child is meaningful. “[A] natural parent’s desire for and right to the companionship, care, custody, and management of his or her children,” we have explained, “is an interest far more precious than any property

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right.” *Santosky v. Kramer*, 455 U.S. 745, 758–759, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (internal quotation marks omitted). See also *infra*, at 2581 – 2583. Although the Constitution does not compel the protection of a biological father’s parent-child relationship until he has taken steps to cultivate it, this Court has nevertheless recognized that “the biological connection ... offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring.” *Lehr v. Robertson*, 463 U.S. 248, 262, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983). Federal recognition of a parent-child relationship between a birth father and his child is consistent with ICWA’s purpose of providing greater protection for

the familial bonds between Indian parents and their children than state law may afford.

The majority does not and cannot reasonably dispute that ICWA grants biological fathers, as “parent[s],” the right to be present at a termination of parental rights proceeding and to have their views and claims heard there.<sup>2</sup> But the majority gives with one hand and takes away with the other. Having assumed a uniform federal definition of “parent” that confers certain procedural rights, the majority then illogically concludes that ICWA’s *substantive* protections are available only to a subset of “parent[s]”: those who have previously had physical or state-recognized legal custody of his or her child. The statute does not support this departure.

Section 1912(d) provides that

“Any party seeking to effect a foster care placement of, or *termination of parental rights to*, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.” (Emphasis added.)

In other words, subsection (d) requires that an attempt be made to cure familial deficiencies before the drastic measures of foster care placement or termination of parental rights can be taken.

The majority would hold that the use of the phrase “breakup of the Indian family” in this subsection means that it does not apply where a birth father has not previously had custody of his child. *Ante*, at 2562 – 2563. But there is nothing about this capacious phrase that licenses such a narrowing construction. As the majority notes, “breakup” means “‘[t]he discontinuance of a relationship.’ ” *Ante*, at 2562 (quoting *American Heritage*

Dictionary 235 (3d ed. 1992)). So far, all of § 1912's provisions expressly apply in actions aimed at terminating the "parent-child relationship" that exists between a birth father and his child, and they extend to it meaningful protections. As a logical matter, that relationship is fully capable of being preserved via remedial services and rehabilitation programs. See *infra*, at 2564 – 2565. Nothing in the text of subsection (d) indicates that this blood relationship should be excluded from the category of familial "relationships" that the provision aims to save from "discontinuance."

The majority, reaching the contrary conclusion, asserts baldly that "when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no 'relationship' that would be 'discontinu[ed]' ... by the termination of the Indian parent's rights." *Ante*, at 2565.

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Says who? Certainly not the statute. Section 1903 recognizes Birth Father as Baby Girl's "parent," and, in conjunction with ICWA's other provisions, it further establishes that their "parent-child relationship" is protected under federal law. In the face of these broad definitions, the majority has no warrant to substitute its own policy views for Congress' by saying that "no 'relationship' " exists between Birth Father and Baby Girl simply because, based on the hotly contested facts of this case, it views their family bond as insufficiently substantial to deserve protection.<sup>3</sup>*Ibid*.

The majority states that its "interpretation of § 1912(d) is ... confirmed by the provision's placement next to § 1912(e) and § 1912(f)," both of which use the phrase "continued custody." *Ante*, at 2563. This is the only aspect of the majority's argument regarding § 1912(d) that is based on ICWA's actual text rather than layers of assertion

superimposed on the text; but the conclusion the majority draws from the juxtaposition of these provisions is exactly backward.

Section 1912(f) is paired with § 1912(e), and as the majority notes, both come on the heels of the requirement of rehabilitative efforts just reviewed. The language of the two provisions is nearly identical; subsection (e) is headed "Foster care placement orders," and subsection (f), the relevant provision here, is headed "Parental rights termination orders." Subsection (f) reads in its entirety,

"No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." § 1912(f).<sup>4</sup>

The immediate inference to be drawn from the statute's structure is that subsections (e) and (f) work in tandem with the rehabilitative efforts required by (d). Under subsection (d), state authorities must attempt to provide "remedial services and rehabilitative programs" aimed at avoiding foster care placement or termination of parental rights; (e) and (f), in turn, bar state authorities from ordering foster care or terminating parental rights until these curative efforts have failed and it is established that the child will suffer "serious emotional or physical damage" if his or her familial situation is not altered. Nothing in subsections (a) through (d) suggests a limitation on the types of parental relationships

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that are protected by any of the provisions of § 1912, and there is nothing in the structure of § 1912 that would lead a reader to expect subsection (e) or (f) to introduce any such qualification. Indeed, both subsections, in

their opening lines, refer back to the prior provisions of § 1912 with the phrase “in such proceeding.” This language indicates, quite logically, that in actions where subsections (a), (b), (c), and (d) apply, (e) and (f) apply too.<sup>5</sup>

All this, and still the most telling textual evidence is yet to come: The text of the subsection begins by announcing, “[n]o termination of parental rights may be ordered” unless the specified evidentiary showing is made. To repeat, a “termination of parental rights” includes “any action resulting in the termination of the parent-child relationship,” 25 U.S.C. § 1903(1)(ii) (emphasis added), including the relationship Birth Father, as an ICWA “parent,” has with Baby Girl. The majority’s reading disregards the Act’s sweeping definition of “termination of parental rights,” which is not limited to terminations of custodial relationships.

The entire foundation of the majority’s argument that subsection (f) does not apply is the lonely phrase “continued custody.” It simply cannot bear the interpretive weight the majority would place on it.

Because a primary dictionary definition of “continued” is “‘carried on or kept up without cessation,’” *ante*, at 2560 (brackets omitted), the majority concludes that § 1912(f) “does not apply in cases where the Indian parent *never* had custody of the Indian child,” *ante*, at 2560. Emphasizing that Birth Father never had physical custody or, under state law, legal custody of Baby Girl, the majority finds the statute inapplicable here. *Ante*, at 2576 – 2578. But “literalness may strangle meaning.” *Utah Junk Co. v. Porter*, 328 U.S. 39, 44, 66 S.Ct. 889, 90 L.Ed. 1071 (1946). See also *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341–345, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (noting that a term that may “[a]t first blush” seem unambiguous can prove otherwise when examined in the

context of the statute as a whole).<sup>6</sup> In light of the structure of § 1912, which indicates that subsection (f) is applicable to the same actions to which subsections (a) through (d) are applicable; the use of the phrase “such proceeding[s]” at the start of subsection (f) to reinforce this structural inference; and finally, the provision’s explicit statement that it applies to “termination of parental rights” proceedings, the necessary conclusion is that the word “custody” does not strictly denote a state-recognized custodial relationship. If one refers back to the Act’s definitional section, this conclusion is not surprising. Section 1903(1) includes “any action resulting in the termination of the parent-child relationship” within the meaning of “child custody proceeding,” thereby belying any congressional

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intent to give the term “custody” a narrow and exclusive definition throughout the statute.

In keeping with § 1903(1) and the structure and language of § 1912 overall, the phrase “continued custody” is most sensibly read to refer generally to the continuation of the parent-child relationship that an ICWA “parent” has with his or her child. A court applying § 1912(f) where the parent does not have pre-existing custody should, as Birth Father argues, determine whether the party seeking termination of parental rights has established that the continuation of the parent-child relationship will result in “serious emotional or physical damage to the child.”<sup>7</sup>

The majority is willing to assume, for the sake of argument, that Birth Father is a “parent” within the meaning of ICWA. But the majority fails to account for all that follows from that assumption. The majority repeatedly passes over the term “termination of parental rights” that, as defined by § 1903, clearly encompasses an action aimed at

severing Birth Father's "parent-child relationship" with Baby Girl. The majority chooses instead to focus on phrases not statutorily defined that it then uses to exclude Birth Father from the benefits of his parental status. When one must disregard a statute's use of terms that have been explicitly defined by Congress, that should be a signal that one is distorting, rather than faithfully reading, the law in question.

## B

The majority also does not acknowledge the full implications of its assumption that there are some ICWA "parent[s]" to whom §§ 1912(d) and (f) do not apply. Its discussion focuses on Birth Father's particular actions, but nothing in the majority's reasoning limits its manufactured class of semiprotected ICWA parents to biological fathers who failed to support their child's mother during pregnancy. Its logic would apply equally to noncustodial fathers who have actively participated in their child's upbringing.

Consider an Indian father who, though he has never had custody of his biological child, visits her and pays all of his child support obligations. <sup>8</sup> Suppose that, due to

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deficiencies in the care the child received from her custodial parent, the State placed the child with a foster family and proposed her ultimate adoption by them. Clearly, the father's parental rights would have to be terminated before the adoption could go forward.<sup>9</sup> On the majority's view, notwithstanding the fact that this father would be a "parent" under ICWA, he would not receive the benefit of either § 1912(d) or § 1912(f). Presumably the court considering the adoption petition would have to apply some standard to determine whether termination of his parental rights was appropriate. But from whence would that standard come?

Not from the statute Congress drafted, according to the majority. The majority suggests that it might come from state law. See *ante*, at 2563, n. 8. But it is incongruous to suppose that Congress intended a patchwork of federal and state law to apply in termination of parental rights proceedings. Congress enacted a statute aimed at protecting the familial relationships between Indian parents and their children because it concluded that state authorities "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). It provided a "minimum Federal standar [d]," § 1902, for termination of parental rights that is more demanding than the showing of unfitness under a high "clear and convincing evidence" standard that is the norm in the States, see 1 J. Hollinger, *Adoption Law and Practice* § 2.10 (2012); *Santosky*, 455 U.S., at 767–768, 102 S.Ct. 1388.

While some States might provide protections comparable to § 1912(d)'s required remedial efforts and § 1912(f)'s heightened standard for termination of parental rights, many will provide less. There is no reason to believe Congress wished to leave protection of the parental rights of a subset of ICWA "parent[s]" dependent on the happenstance of where a particular "child custody proceeding" takes place. I would apply, as the statute construed in its totality commands, the standards Congress provided in §§ 1912(d) and (f) to the termination

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of all ICWA "parent[s]" parent-child relationships.

## II

The majority's textually strained and illogical reading of the statute might be explicable, if not justified, if there were reason to believe that it avoided anomalous

results or furthered a clear congressional policy. But neither of these conditions is present here.

### A

With respect to § 1912(d), the majority states that it would be “unusual” to apply a rehabilitation requirement where a natural parent has never had custody of his child. *Ante*, at 2563 – 2564. The majority does not support this bare assertion, and in fact state child welfare authorities can and do provide reunification services for biological fathers who have not previously had custody of their children.<sup>10</sup> And notwithstanding the South Carolina Supreme Court’s imprecise interpretation of the provision, see 398 S.C., at 647–648, 731 S.E.2d, at 562, § 1912(d) does not require the prospective adoptive family to themselves undertake the mandated rehabilitative efforts. Rather, it requires the party seeking termination of parental rights to “satisfy the court that active efforts have been made” to provide appropriate remedial services.

In other words, the prospective adoptive couple have to make an evidentiary showing, not undertake person-to-person remedial outreach. The services themselves might be attempted by the Indian child’s Tribe, a state agency, or a private adoption agency. Such remedial efforts are a familiar requirement of child welfare law, including federal child welfare policy. See 42 U.S.C. § 671(a)(15)(B) (requiring States receiving federal funds for foster care and adoption assistance to make “reasonable efforts ... to preserve and reunify families” prior to foster care placement or removal of a child from its home).

There is nothing “bizarre,” *ante*, at 2563 – 2564, about placing on the party seeking to terminate a father’s parental rights the burden of showing that the step is necessary as well as justified. “For ... natural parents, ... the consequence of an erroneous termination [of parental rights] is the unnecessary

destruction of their natural family.” *Santosky*, 455 U.S., at 766, 102 S.Ct. 1388. In any event, the question is a nonissue in this case given the family court’s finding that Birth Father is “a fit and proper person to have custody of his child” who “has demonstrated [his] ability to parent effectively” and who possesses “unwavering love for this child.” App. to Pet. for Cert. 128a (Sealed). Petitioners cannot show that rehabilitative efforts have “proved unsuccessful,” 25 U.S.C. § 1912(d), because Birth Father is not in need of rehabilitation.<sup>11</sup>

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### B

On a more general level, the majority intimates that ICWA grants Birth Father an undeserved windfall: in the majority’s words, an “ICWA trump card” he can “play ... at the eleventh hour to override the mother’s decision and the child’s best interests.” *Ante*, at 2565. The implicit argument is that Congress could not possibly have intended to recognize a parent-child relationship between Birth Father and Baby Girl that would have to be legally terminated (either by valid consent or involuntary termination) before the adoption could proceed.

But this supposed anomaly is illusory. In fact, the law of at least 15 States did precisely that at the time ICWA was passed.<sup>12</sup> And the law of a number of States still does so. The State of Arizona, for example, requires that notice of an adoption petition be given to all “potential father[s]” and that they be informed of their “right to seek custody.” *Ariz.Rev.Stat. §§ 8–106(G)–(J)* (West Supp.2012). In Washington, an “alleged father[’s]” consent to adoption is required absent the termination of his parental rights, *Wash. Rev.Code §§ 26.33.020(1), 26.33.160(1)(b)* (2012); and those rights may be terminated only “upon a showing by clear, cogent, and convincing evidence” not only that termination is in the best interest of the child and that the father is withholding his

consent to adoption contrary to child's best interests, but also that the father "has failed to perform parental duties under circumstances showing a substantial lack of regard for his parental obligations," § 26.33.120(2).<sup>13</sup>

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Without doubt, laws protecting biological fathers' parental rights can lead—even outside the context of ICWA—to outcomes that are painful and distressing for both would-be adoptive families, who lose a much wanted child, and children who must make a difficult transition. See, e.g., *In re Adoption of Tobias D.*, 2012 Me. 45, ¶ 27, 40 A.3d 990, 999 (recognizing that award of custody of 2 1/2-year-old child to biological father under applicable state law once paternity is established will result in the "difficult and painful" necessity of "removing the child from the only home he has ever known"). On the other hand, these rules recognize that biological fathers have a valid interest in a relationship with their child. See *supra*, at 2574 – 2575. And children have a reciprocal interest in knowing their biological parents. See *Santosky*, 455 U.S., at 760–761, n. 11, 102 S.Ct. 1388 (describing the foreclosure of a newborn child's opportunity to "ever know his natural parents" as a "los[s] [that] cannot be measured"). These rules also reflect the understanding that the biological bond between a parent and a child is a strong foundation on which a stable and caring relationship may be built. Many jurisdictions apply a custodial preference for a fit natural parent over a party lacking this biological link. See, e.g., *Ex parte Terry*, 494 So.2d 628, 632 (Ala.1986); *Appeal of H. R.*, 581 A.2d 1141, 1177 (D.C.1990) (opinion of Ferren, J.); *Stuhr v. Stuhr*, 240 Neb. 239, 245, 481 N.W.2d 212, 216 (1992); *In re Michael B.*, 80 N.Y.2d 299, 309, 590 N.Y.S.2d 60, 604 N.E.2d 122, 127 (1992). Cf. *Smith v. Organization of Foster Families For Equality & Reform*, 431 U.S. 816, 845, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977) (distinguishing a natural

parent's "liberty interest in family privacy," which has its source "in intrinsic human rights," with a foster parent's parallel interest in his or her relationship with a child, which has its "origins in an arrangement in which the State has been a partner from the outset"). This preference is founded in the "presumption that fit parents act in the best interests of their children." *Troxel v. Granville*, 530 U.S. 57, 68, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion). "[H]istorically [the law] has recognized that natural bonds of affection [will] lead parents' " to promote their child's well-being. *Ibid.* (quoting *Parham v. J. R.*, 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979)).

Balancing the legitimate interests of unwed biological fathers against the need for stability in a child's family situation is difficult, to be sure, and States have, over the years, taken different approaches to the problem. Some States, like South Carolina, have opted to hew to the constitutional baseline established by this Court's precedents and do not require a biological father's consent to adoption unless he has provided financial support during pregnancy. See *Quilloin v. Walcott*, 434 U.S. 246, 254–256, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *Lehr*, 463 U.S., at 261, 103 S.Ct. 2985. Other States, however, have decided to give the rights of biological fathers more robust protection and to afford them consent rights on the basis of their biological link to the child. At the time that ICWA was passed, as noted, over one-fourth of States did so. See *supra*, at 2580 – 2581.

ICWA, on a straightforward reading of the statute, is consistent with the law of those States that protected, and protect, birth fathers' rights more vigorously. This reading can hardly be said to generate an anomaly. ICWA, as all acknowledge, was "the product of rising concern

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... [about] abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families.” *Holyfield*, 490 U.S., at 32, 109 S.Ct. 1597. It stands to reason that the Act would not render the legal status of an Indian father’s relationship with his biological child fragile, but would instead grant it a degree of protection commensurate with the more robust state-law standards.<sup>14</sup>

### C

The majority also protests that a contrary result to the one it reaches would interfere with the adoption of Indian children. *Ante*, at 2563 – 2564, 2564 – 2565. This claim is the most perplexing of all. A central purpose of ICWA is to “promote the stability and security of Indian ... families,” 25 U.S.C. § 1902, in part by countering the trend of placing “an alarmingly high percentage of [Indian] children ... in non-Indian foster and adoptive homes and institutions.” § 1901(4). The Act accomplishes this goal by, first, protecting the familial bonds of Indian parents and children, see *supra*, at 2573 – 2578; and, second, establishing placement preferences should an adoption take place, see § 1915(a). ICWA does not interfere with the adoption of Indian children except to the extent that it attempts to avert the necessity of adoptive placement and makes adoptions of Indian children by non-Indian families less likely.

The majority may consider this scheme unwise. But no principle of construction licenses a court to interpret a statute with a view to averting the very consequences Congress expressly stated it was trying to bring about. Instead, it is the “ ‘judicial duty to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question.’ ” *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 298, 130 S.Ct. 1396, 176 L.Ed.2d 225 (2010) (quoting *United*

*States v. Bornstein*, 423 U.S. 303, 310, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976)).

The majority further claims that its reading is consistent with the “primary” purpose of the Act, which in the majority’s view was to prevent the dissolution of “intact” Indian families. *Ante*, at 2560 – 2562. We may not, however, give effect only to congressional goals we designate “primary” while casting aside others classed as “secondary”; we must apply the entire statute Congress has written. While there are indications that central among Congress’ concerns in enacting ICWA was the removal of Indian children from homes in which Indian parents or other guardians had custody of them, see, e.g., §§ 1901(4), 1902, Congress also recognized that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children,” § 1901(3). As we observed in *Holyfield*, ICWA protects not only Indian parents’ interests but also those of Indian tribes. See 490 U.S., at 34, 52, 109 S.Ct. 1597. A tribe’s interest in its next generation of citizens is adversely

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affected by the placement of Indian children in homes with no connection to the tribe, whether or not those children were initially in the custody of an Indian parent.<sup>15</sup>

Moreover, the majority’s focus on “intact” families, *ante*, at 2561 – 2562, begs the question of what Congress set out to accomplish with ICWA. In an ideal world, perhaps all parents would be perfect. They would live up to their parental responsibilities by providing the fullest possible financial and emotional support to their children. They would never suffer mental health problems, lose their jobs, struggle with substance dependency, or encounter any of the other multitudinous personal crises that can make it difficult to meet these responsibilities. In an ideal world parents would never become

estranged and leave their children caught in the middle. But we do not live in such a world. Even happy families do not always fit the custodial-parent mold for which the majority would reserve ICWA's substantive protections; unhappy families all too often do not. They are families nonetheless. Congress understood as much. ICWA's definitions of "parent" and "termination of parental rights" provided in § 1903 sweep broadly. They should be honored.

### D

The majority does not rely on the theory pressed by petitioners and the guardian ad litem that the canon of constitutional avoidance compels the conclusion that ICWA is inapplicable here. See Brief for Petitioners 43–51; Brief for Respondent Guardian Ad Litem 48–58. It states instead that it finds the statute clear.<sup>16</sup> *Ante*, at 2565. But the majority nevertheless offers the suggestion that a contrary result would create an equal protection problem. *Ibid.* Cf. Brief for Petitioners 44–47; Brief for Respondent Guardian Ad Litem 53–55.

It is difficult to make sense of this suggestion in light of our precedents, which squarely hold that classifications based on Indian tribal membership are not impermissible racial classifications. See *United States v. Antelope*, 430 U.S. 641, 645–647, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977); *Morton v. Mancari*, 417 U.S. 535, 553–554, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). The majority's repeated, analytically unnecessary references to the fact that Baby Girl is 3/256 Cherokee by ancestry do nothing to elucidate its intimation that the statute may violate the Equal Protection Clause as applied here. See *ante*, at 2556 – 2557, 2559; see also *ante*, at 2565 (stating that ICWA "would put certain vulnerable children at a great disadvantage solely because an ancestor— *even a remote one*—was an Indian" (emphasis added)). I see no ground for this Court to second-guess the membership requirements of federally

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recognized Indian tribes, which are independent political entities. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, n. 32, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). I am particularly averse to doing so when the Federal Government requires Indian tribes, as a prerequisite for official recognition, to make "descen[t] from a historical Indian tribe" a condition of membership. 25 CFR § 83.7(e) (2012).

The majority's treatment of this issue, in the end, does no more than create a lingering mood of disapprobation of the criteria for membership adopted by the Cherokee Nation that, in turn, make Baby Girl an "Indian child" under the statute. Its hints at lurking constitutional problems are, by its own account, irrelevant to its statutory analysis, and accordingly need not detain us any longer.

### III

Because I would affirm the South Carolina Supreme Court on the ground that § 1912 bars the termination of Birth Father's parental rights, I would not reach the question of the applicability of the adoptive placement preferences of § 1915. I note, however, that the majority does not and cannot foreclose the possibility that on remand, Baby Girl's paternal grandparents or other members of the Cherokee Nation may formally petition for adoption of Baby Girl. If these parties do so, and if on remand Birth Father's parental rights are terminated so that an adoption becomes possible, they will then be entitled to consideration under the order of preference established in § 1915. The majority cannot rule prospectively that § 1915 would not apply to an adoption petition that has not yet been filed. Indeed, the statute applies "[i]n any adoptive placement of an Indian child under State law," 25 U.S.C. § 1915(a) (emphasis added), and contains no temporal qualifications. It would indeed be an

odd result for this Court, in the name of the child's best interests, cf. *ante*, at 2564, to purport to exclude from the proceedings possible custodians for Baby Girl, such as her paternal grandparents, who may have well-established relationships with her.

\* \* \*

The majority opinion turns § 1912 upside down, reading it from bottom to top in order to reach a conclusion that is manifestly contrary to Congress' express purpose in enacting ICWA: preserving the familial bonds between Indian parents and their children and, more broadly, Indian tribes' relationships with the future citizens who are "vital to [their] continued existence and integrity." § 1901(3).

The majority casts Birth Father as responsible for the painful circumstances in this case, suggesting that he intervened "at the eleventh hour to override the mother's decision and the child's best interests," *ante*, at 2565. I have no wish to minimize the trauma of removing a 27-month-old child from her adoptive family. It bears remembering, however, that Birth Father took action to assert his parental rights when Baby Girl was four months old, as soon as he learned of the impending adoption. As the South Carolina Supreme Court recognized, "[h]ad the mandate of ... ICWA been followed [in 2010], ... much potential anguish might have been avoided[;] and in any case the law cannot be applied so as automatically to "reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation." ' ' 398 S.C., at 652, 731 S.E.2d, at 564 (quoting *Holyfield*, 490 U.S., at 53–54, 109 S.Ct. 1597).

The majority's hollow literalism distorts the statute and ignores Congress' purpose in order to rectify a perceived wrong that, while heartbreaking at the time, was a

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correct application of federal law and that in any case cannot be undone. Baby Girl has now resided with her father for 18 months. However difficult it must have been for her to leave Adoptive Couple's home when she was just over 2 years old, it will be equally devastating now if, at the age of 3 1/2, she is again removed from her home and sent to live halfway across the country. Such a fate is not foreordained, of course. But it can be said with certainty that the anguish this case has caused will only be compounded by today's decision.

I believe that the South Carolina Supreme Court's judgment was correct, and I would affirm it. I respectfully dissent.

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Notes:

\* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

<sup>1</sup> It is undisputed that Baby Girl is an "Indian child" as defined by the ICWA because she is an unmarried minor who "is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe," § 1903(4)(b). See Brief for Respondent Birth Father 1, 51, n. 22; Brief for Respondent Cherokee Nation 1; Brief for Petitioners 44 ("Baby Girl's eligibility for membership in the Cherokee Nation depends solely upon a lineal blood relationship with a tribal ancestor"). It is also undisputed that the present case concerns a "child custody proceeding," which the ICWA defines to include proceedings that involve "termination of parental rights" and "adoptive placement,"

<sup>2</sup> Around the same time, the Cherokee Nation identified Biological Father as a registered member and concluded that Baby Girl was an “Indian child” as defined in the ICWA. The Cherokee Nation intervened in the litigation approximately three months later.

<sup>3</sup> According to the guardian ad litem, Biological Father allowed Baby Girl to speak with Adoptive Couple by telephone the following day, but then cut off all communication between them. Moreover, according to Birth Mother, Biological Father has made no attempt to contact her since the time he took custody of Baby Girl.

<sup>4</sup> If Biological Father is not a “parent” under the ICWA, then § 1912(f) and § 1912(d)—which relate to proceedings involving possible termination of “parental” rights—are inapplicable. Because we conclude that these provisions are inapplicable for other reasons, however, we need not decide whether Biological Father is a “parent.”

<sup>5</sup> With a torrent of words, the dissent attempts to obscure the fact that its interpretation simply cannot be squared with the statutory text. A biological father’s “continued custody” of a child cannot be assessed if the father never had custody at all, and the use of a different phrase—“termination of parental rights”—cannot change that. In addition, the dissent’s reliance on subsection headings, *post*, at 2560 – 2561, overlooks the fact that those headings were not actually enacted by Congress. See 92 Stat. 3071–3072.

<sup>6</sup> The dissent criticizes us for allegedly concluding that a biological father qualifies

for “substantive” statutory protections “only when [he] has physical or state-recognized legal custody.” *Post*, at 2572 – 2573, 2574 – 2575. But the dissent undercuts its own point when it states that “numerous” ICWA provisions not at issue here afford “meaningful” protections to biological fathers regardless of whether they ever had custody. *Post*, at 2573 – 2575, and nn. 1, 2.

<sup>7</sup> In an effort to rebut our supposed conclusion that “Congress *could not* possibly have intended” to require legal termination of Biological Father’s rights with respect to Baby Girl, the dissent asserts that a minority of States afford (or used to afford) protection to similarly situated biological fathers. See *post*, at 2580 – 2581, and n. 12 (emphasis added). This is entirely beside the point, because we merely conclude that, based on the statute’s text and structure, Congress *did not* extend the heightened protections of § 1912(d) and § 1912(f) to all biological fathers. The fact that state laws may provide certain protections to biological fathers who have abandoned their children and who have never had custody of their children in no way undermines our analysis of these two federal statutory provisions.

<sup>8</sup> The dissent claims that our reasoning “necessarily extends to *all* Indian parents who have never had custody of their children,” even if those parents have visitation rights. *Post*, at 2572 – 2573, 2578 – 2579. As an initial matter, the dissent’s concern about the effect of our decision on individuals with visitation rights will be implicated, at most, in a relatively small class of cases. For example, our interpretation of § 1912(d) would implicate the dissent’s concern only in the case of a parent who abandoned his or her child prior to birth and *never* had physical or legal custody, but *did* have some sort of visitation rights. Moreover, in cases where this concern is implicated, such parents might

receive “comparable” protections under state law. See *post*, at 2579 – 2580. And in any event, it is the *dissent's* interpretation that would have far-reaching consequences: Under the dissent's reading, *any* biological parent—even a sperm donor—would enjoy the heightened protections of § 1912(d) and § 1912(f), even if he abandoned the mother and the child immediately after conception. *Post*, at 2579, n. 8.

9. Biological Father and the Solicitor General argue that a tribe or state agency *could* provide the requisite remedial services under § 1912(d). Brief for Respondent Birth Father 43; Brief for United States as *Amicus Curiae* 22. But what if they don't? And if they don't, would the adoptive parents have to undertake the task?

10. The dissent repeatedly mischaracterizes our opinion. As our detailed discussion of the terms of the ICWA makes clear, our decision is not based on a “[p]olicy disagreement with Congress' judgment.” *Post*, at 2572 – 2573; see also *post*, at 2575 – 2576, 2583.

11. Section 1915(c) also provides that, in the case of an adoptive placement under § 1915(a), “if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in [§ 1915(b)].” Although we need not decide the issue here, it may be the case that an Indian child's tribe could alter § 1915's preferences in a way that includes a biological father whose rights were terminated, but who has now reformed. See § 1915(c). If a tribe were to take such an approach, however, the court would still have the power to determine whether “good cause”

exists to disregard the tribe's order of preference. See §§ 1915(a), (c); *In re Adoption of T.R.M.*, 525 N.E.2d 298, 313 (Ind.1988).

12. To be sure, an employee of the Cherokee Nation testified that the Cherokee Nation certifies families to be adoptive parents and that there are approximately 100 such families “that are ready to take children that want to be adopted.” Record 446. However, this testimony was only a general statement regarding the Cherokee Nation's practices; it did not demonstrate that a specific Indian family was willing to adopt Baby Girl, let alone that such a family formally sought such adoption in the South Carolina courts. See Reply Brief for Petitioners 13–14; see also Brief for Respondent Cherokee Nation 21–22.

\* \* \*

1. South Carolina, for example, required traders to be licensed, to be of good moral character, and to post a bond. Ordinance to Regulate Indian Affairs, in 16 Early American Indian Documents, at 331–334. A potential applicant's name was posted publicly before issuing the license, so anyone with objections had an opportunity to raise them. *Id.*, at 332. Restrictions were placed on employing agents, *id.*, at 333–334, and names of potential agents had to be disclosed. *Id.*, at 333. Traders who violated these rules were subject to substantial penalties. *Id.*, at 331, 334.

2. Although Indians were generally considered “members” of a State if they paid taxes or were citizens, see Natelson 230, the precise definition of the term was “not yet settled” at the time of the founding and was “a question of frequent perplexity and contention in the federal councils,” The Federalist No. 42, p. 265 (C. Rossiter ed. 1961) (J. Madison).

<sup>3</sup> Petitioners and the guardian ad litem contend that applying the ICWA to child custody proceedings on the basis of race implicates equal protection concerns. See Brief for Petitioners 45 (arguing that the statute would be unconstitutional “if unwed fathers with no preexisting substantive parental rights receive a statutory preference based solely on the Indian child’s race”); Brief for Respondent Guardian Ad Litem 48–49 (same). I need not address this argument because I am satisfied that Congress lacks authority to regulate the child custody proceedings in this case.

<sup>1</sup> For this reason, the South Carolina Supreme Court held that Birth Father did not give valid consent to Baby Girl’s adoption when, four months after her birth, he signed papers stating that he accepted service and was not contesting the adoption. See 398 S.C. 625, 645–646, 731 S.E.2d 550, 561 (2012). See also *ante*, at 2558 – 2559. Petitioners do not challenge this aspect of the South Carolina court’s holding.

<sup>2</sup> Petitioners concede that, assuming Birth Father is a “parent” under ICWA, the notice and counsel provisions of 25 U.S.C. §§ 1912(a) and (b) apply to him. See Tr. of Oral Arg. 13.

<sup>3</sup> The majority’s discussion of § 1912(d) repeatedly references Birth Father’s purported “abandon[ment]” of Baby Girl, *ante*, at 2562 – 2563, 2563, n. 8, 2563 – 2564, and it contends that its holding with regard to this provision is limited to such circumstances, see *ante*, at 2563, n. 8; see also *ante*, at 2571 (BREYER, J., concurring). While I would welcome any limitations on the majority’s holding given that it is contrary to the language and purpose of the statute, the majority never explains either the textual basis or the precise scope of its “abandon[ment]” limitation. I expect that the majority’s inexact use of the term “abandon [ment]” will sow confusion, because it is a commonly used term of art in state family law

that does not have a uniform meaning from State to State. See generally 1 J. Hollinger, *Adoption Law and Practice* § 4.04[1][a][ii] (2012) (discussing various state-law standards for establishing parental abandonment of a child).

<sup>4</sup> The full text of subsection (e) is as follows:

“No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” § 1912(e).

<sup>5</sup> For these reasons, I reject the argument advanced by the United States that subsection (d) applies in the circumstances of this case but subsection (f) does not. See Brief for United States as *Amicus Curiae* 24–26. The United States’ position is contrary to the interrelated nature of §§ 1912(d), (e), and (f). Under the reading that the United States proposes, in a case such as this one the curative provision would stand alone; ICWA would provide no evidentiary or substantive standards by which to measure whether foster care placement or termination of parental rights could be ordered in the event that rehabilitative efforts did not succeed. Such a scheme would be oddly incomplete.

<sup>6</sup> The majority’s interpretation is unpersuasive even if one focuses exclusively on the phrase “continued custody” because, as Justice SCALIA explains, *ante*, at 2571 – 2572 (dissenting opinion), nothing about the adjective “continued” mandates the retrospective, rather than prospective, application of § 1912(f)’s standard.

<sup>7</sup> The majority overlooks Birth Father’s principal arguments when it dismisses his reading of § 1912(f) as “nonsensical.” *Ante*, at

2560. He does argue that *if* one accepts petitioners' view that it is impossible to make a determination of likely harm when a parent lacks custody, *then* the consequence would be that “ [n]o termination of parental rights may be ordered.” Brief for Respondent Birth Father 39 (quoting § 1912(f)). But Birth Father's primary arguments assume that it is indeed possible to make a determination of likely harm in the circumstances of this case, and that parental rights can be terminated if § 1912(f) is met. See *id.*, at 40–42.

8. The majority attempts to minimize the consequences of its holding by asserting that the parent-child relationships of noncustodial fathers with visitation rights will be at stake in an ICWA proceeding in only “a relatively small class of cases.” *Ante*, at 2563, n. 8. But it offers no support for this assertion, beyond speculating that there will not be many fathers affected by its interpretation of § 1912(d) because it is qualified by an “abandon[ment]” limitation. *Ibid.* Tellingly, the majority has nothing to say about § 1912(f), despite the fact that its interpretation of that provision is not limited in a similar way. In any event, this example by no means exhausts the class of semiprotected ICWA parents that the majority's opinion creates. It also includes, for example, biological fathers who have not yet established a relationship with their child because the child's mother never informed them of the pregnancy, see, *e.g.*, *In re Termination of Parental Rights of Biological Parents of Baby Boy W.*, 1999 OK 74, 988 P.2d 1270, told them falsely that the pregnancy ended in miscarriage or termination, see, *e.g.*, *A Child's Hope, LLC v. Doe*, 178 N.C.App. 96, 630 S.E.2d 673 (2006), or otherwise obstructed the father's involvement in the child's life, see, *e.g.*, *In re Baby Girl W.*, 728 S.W.2d 545 (Mo.App.1987) (birth mother moved and did not inform father of her whereabouts); *In re Petition of Doe*, 159 Ill.2d 347, 202 Ill.Dec. 535, 638 N.E.2d 181 (1994) (father paid pregnancy expenses until birth mother cut off contact with him and told him that their child had

died shortly after birth). And it includes biological fathers who did not contribute to pregnancy expenses because they were unable to do so, whether because the father lacked sufficient means, the expenses were covered by a third party, or the birth mother did not pass on the relevant bills. See, *e.g.*, *In re Adoption of B. V.*, 2001 UT App 290, ¶¶ 24–31, 33 P.3d 1083, 1087–1088.

The majority expresses the concern that my reading of the statute would produce “far-reaching consequences,” because “even a sperm donor” would be entitled to ICWA's protections. *Ante*, at 2563, n. 8. If there are any examples of women who go to the trouble and expense of artificial insemination and then carry the child to term, only to put the child up for adoption or be found so unfit as mothers that state authorities attempt an involuntary adoptive placement—thereby necessitating termination of the parental rights of the sperm donor father—the majority does not cite them. As between a possibly overinclusive interpretation of the statute that covers this unlikely class of cases, and the majority's underinclusive interpretation that has the very real consequence of denying ICWA's protections to all noncustodial biological fathers, it is surely the majority's reading that is contrary to ICWA's design.

9. With a few exceptions not relevant here, before a final decree of adoption may be entered, one of two things must happen: “the biological parents must either voluntarily relinquish their parental rights or have their rights involuntarily terminated.” 2 A. Haralambie, *Handling Child Custody, Abuse and Adoption Cases* § 14.1, pp. 764–765 (3d ed. 2009) (footnote omitted).

10. See, *e.g.*, Cal. Welf. & Inst. Code Ann. § 361.5(a) (West Supp. 2013); *Francisco G. v. Superior Court*, 91 Cal.App.4th 586, 596, 110 Cal.Rptr.2d 679, 687 (2001) (stating that “the juvenile court ‘may’ order reunification services for a biological father if the court

determines that the services will benefit the child”); *In re T.B.W.*, 312 Ga.App. 733, 734–735, 719 S.E.2d 589, 591 (2011) (describing reunification services provided to biological father beginning when “he had yet to establish his paternity” under state law, including efforts to facilitate visitation and involving father in family “‘team meetings’”); *In re Guardianship of DMH*, 161 N.J. 365, 391–394, 736 A.2d 1261, 1275–1276 (1999) (discussing what constitutes “reasonable efforts” to reunify a noncustodial biological father with his children in accordance with New Jersey statutory requirements); *In re Bernard T.*, 319 S.W.3d 586, 600 (Tenn.2010) (stating that “in appropriate circumstances, the Department [of Children’s Services] must make reasonable efforts to reunite a child with his or her biological parents or legal parents or even with the child’s putative biological father”).

11. The majority’s concerns about what might happen if no state or tribal authority stepped in to provide remedial services are therefore irrelevant here. *Ante*, at 2564, n. 9. But as a general matter, if a parent has rights that are an obstacle to an adoption, the state- and federal-law safeguards of those rights must be honored, irrespective of prospective adoptive parents’ understandable and valid desire to see the adoption finalized. “We must remember that the purpose of an adoption is to provide a home for a child, not a child for a home.” *In re Petition of Doe*, 159 Ill.2d, at 368, 202 Ill.Dec. 535, 638 N.E.2d, at 190 (Heiple, J., supplemental opinion supporting denial of rehearing).

12. See Ariz.Rev.Stat. Ann. § 8–106(A)(1)(c) (1974–1983 West Supp.) (consent of both natural parents necessary); Iowa Code §§ 600.3(2), 600A.2, 600A.8 (1977) (same); Ill. Comp. Stat., ch. 40, § 1510 (West 1977) (same); Nev.Rev.Stat. §§ 127.040, 127.090 (1971) (same); R.I. Gen. Laws §§ 15–7–5, 15–7–7 (Bobbs–Merrill 1970) (same); Conn. Gen.Stat. §§ 45–61d, 45–61i(b)(2) (1979) (natural father’s consent

required if paternity acknowledged or judicially established); Fla. Stat. § 63.062 (1979) (same); Ore.Rev.Stat. §§ 109.092, 109.312 (1975) (same); S.D. Codified Laws §§ 25–6–1.1, 25–6–4 (Allen Smith 1976) (natural father’s consent required if mother identifies him or if paternity is judicially established); Ky.Rev.Stat. Ann. §§ 199.500, 199.607 (Bobbs–Merrill Supp. 1980) (same); Ala.Code § 26–10–3 (Michie 1977) (natural father’s consent required when paternity judicially established); Minn.Stat. §§ 259.24(a), 259.26(3)(a), (e), (f), 259.261 (1978) (natural father’s consent required when identified on birth certificate, paternity judicially established, or paternity asserted by affidavit); N.H.Rev.Stat. Ann. § 170–B:5(I)(d) (1977) (natural father’s consent required if he files notice of intent to claim paternity within set time from notice of prospective adoption); Wash. Rev.Code §§ 26.32.040(5), 26.32.085 (1976) (natural father’s consent required if paternity acknowledged, judicially established, or he files notice of intent to claim paternity within set time from notice of prospective adoption); W. Va.Code Ann. § 48–4–1 (Michie Supp. 1979) (natural father’s consent required if father admits paternity by any means). See also Del.Code Ann., Tit. 13, § 908(2) (Michie Supp. 1980) (natural father’s consent required unless court finds that dispensing with consent requirement is in best interests of the child); Wyo. Stat. Ann. §§ 1–22–108, 1–22–109 (Michie 1988) (same).

13. See also, e.g., Nev.Rev.Stat. §§ 127.040(1)(a), 128.150 (2011).

14. It bears emphasizing that the ICWA standard for termination of parental rights of which Birth Father claims the benefit is more protective than, but not out of step with, the clear and convincing standard generally applied in state courts when termination of parental rights is sought. Birth Father does not claim that he is entitled to custody of Baby Girl unless petitioners can satisfy the demanding standard of § 1912(f). See Brief for Respondent Birth Father 40, n. 15. The

question of custody would be analyzed independently, as it was by the South Carolina Supreme Court. Of course, it will often be the case that custody is subsequently granted to a child's fit parent, consistent with the presumption that a natural parent will act in the best interests of his child. See *supra*, at 2581 – 2583.

<sup>15</sup>. Birth Father is a registered member of the Cherokee Nation, a fact of which Birth Mother was aware at the time of her pregnancy and of which she informed her attorney. See 398 S.C. 625, 632–633, 731 S.E.2d 550, 554 (2012).

<sup>16</sup>. Justice THOMAS concurs in the majority's interpretation because, although he finds the statute susceptible of more than one plausible reading, he believes that the majority's reading avoids “significant constitutional problems” concerning whether ICWA exceeds Congress' authority under the Indian Commerce Clause. *Ante*, at 2565, 2566 – 2571. No party advanced this argument, and it is inconsistent with this Court's precedents holding that Congress has “broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as plenary and exclusive,” founded not only on the Indian Commerce Clause but also the Treaty Clause. *United States v. Lara*, 541 U.S. 193, 200–201, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) (internal quotation marks omitted).



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**Representation in Family Court Proceedings**

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**The Uniform Interstate Family Support Act**



## **BASICS OF THE UNIFORM INTERSTATE FAMILY SUPPORT ACT (UIFSA)**

Tom Gordon, Support Magistrate

Rensselaer County Family Court

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June 2017

### I. Sources of Law

- A. Full Faith and Credit for Child Support Orders Act, 28 U.S.C.A. § 1738B
- B. Family Court Act (FCA), Art. 5-B

### II. Forms

Forms are Available from the NYS Office of Court Administration at  
<http://nycourts.gov/forms/familycourt/uifsa.shtml>

### III. Prior statute

- A. Uniform Support for Dependents Law (USDL)
- B. Repealed in 1997

### IV. Full Faith and Credit for Child Support Orders Act (FFCCSOA)

- A. 28 U.S.C.A. §1738B
- B. Enacted by Congress in 1994
- C. Sets up a process for determining which support order is the controlling order when two or more states have issued an order. §1738B(f)
- D. Prohibits courts from
  - 1. Establishing a new order of support where a valid order already exists in another state. §1738B(a)(2)
  - 2. Modifying another state's order when the issuing state has continuing and exclusive jurisdiction (CEJ). §1738B(e)

### V. Uniform Interstate Family Support Act (UIFSA)

- A. Drafted by the National Conference of Commissioners on Uniform State Laws
- B. States were mandated under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), PL 104-193, to enact UIFSA in order to continue to receive Federal child support enforcement funding.

- C. New York State adopted UIFSA in 1997. It is located at FCA §580.
- D. Sets up processes for the establishment, enforcement, and modification of support orders where two or more states or countries are involved.
- E. In 2014, Congress mandated the adoption of a modified version of UIFSA (UIFSA 2008). NYS adopted UIFSA 2008 in 2015.

VI. Controlling Order and Continuing and Exclusive Jurisdiction (CEJ)

A. Controlling Order

- 1. The most recent support order which is entitled to recognition.
- 2. There can only be one controlling order.

B. Continuing and Exclusive Jurisdiction (CEJ)

1. Child Support Orders (FCA §580-205(a))

- a. The state who made the most recent controlling order has continuing and exclusive jurisdiction to modify the order so long as:

- (1) At least one of the parties or the child continues to reside in the issuing state.
- (2) Notwithstanding that the parties and child no longer reside in the issuing state, the parties have consented in writing or on the record that the issuing state may retain CEJ.

2. Spousal Support Orders (FCA §580-211)

- a. The state that issued the spousal support order maintains CEJ for the duration of the order. Another state may not modify the spousal support order.
- b. A spousal support order may be enforced in another state.

VII. Establishment of Paternity and Support

A. Long-Arm Jurisdiction (FCA §580-201)

- 1. A NYS court may exercise personal jurisdiction if:
  - a. the nonresident is personally served in NYS;

- b. the nonresident submits to jurisdiction by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
  - c. the nonresident resided with the child in this state;
  - d. the nonresident resided in this state and provided prenatal expenses or support for the child;
  - e. the child resides in this state as a result of the acts or directives of the individual;
  - f. the individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse;
  - g. the individual asserted parentage in the putative father registry maintained in this state by the department of social services; or
  - h. there is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.
2. When long-arm jurisdiction is used, NYS law, *including the age of emancipation*, will apply in the establishment of the support obligation.

B. Two-State Process (FCA §580-301 et. seq.)

1. The proceeding is initiated by the filing of a petition and related paperwork with the Support Collection Unit in NYS, which then forwards the papers to the Respondent's state (the "responding tribunal").
2. The physical presence of the petitioner cannot be required by the responding tribunal. FCA §580-316(a). Out-of-state parties and witnesses may appear by telephone or video conference. FCA §580-316(f)
3. When the two-state process is used, the law of the responding state, *including the age of emancipation*, will apply in the establishment of the support obligation. FCA §§580-303, 580-611(c)
4. A responding tribunal may make an order of parentage. FCA §580-402.
5. A responding tribunal may make an order of support, including spousal support, if no other order entitled to recognition exists. FCA §580-401(a)

VIII. Registration of Out-of-State or Foreign Support Orders (FCA §601 et. seq.)

- A. The party seeking enforcement must file the following with the responding tribunal (FCA §602(a)):
  - 1. A letter of transmittal (Form UIFSA-1)  
**Important** - The form must specify whether the registering party is seeking registration for modification, enforcement, or both.
  - 2. Two copies, including a certified copy, of the order sought to be registered
  - 3. A sworn registration statement (Form UIFSA-9)
- B. A petition seeking a remedy, such as modification, may be filed at the same time as the filing of the registration papers. FCA §580-602(c)
- C. Upon receipt, the responding tribunal will issue a notice of registration. (FCA §580-605)
- D. After the issuance of the notice of registration, the nonregistering party has 20 days to file a petition to vacate the registration upon one or more of the following grounds (FCA §580-607(a)):
  - 1. The issuing tribunal lacked personal jurisdiction over the contesting party;
  - 2. The order was obtained by fraud;
  - 3. The order has been vacated, suspended, or modified by a later order;
  - 4. The issuing tribunal has stayed the order pending appeal;
  - 5. There is a defense under the law of this state to the remedy sought;
  - 6. Full or partial payment has been made; or
  - 7. The statute of limitations of the issuing state precludes enforcement of some or all of the arrearages.
    - a. Once an order has been registered, in subsequent enforcement proceedings, the statute of limitations of the issuing tribunal or the respondent, *whichever is longer*, applies. FCA §580-604(b)
  - 8. The alleged controlling order is not in fact the controlling order.

- E. If the nonregistering party fails to respond within 20 days or fails to establish any of the grounds for vacating the registration, the order will be registered by operation of law.

IX. Enforcement of Out-of-State or Foreign Support Orders

- A. An order registered for enforcement may be enforced in the same manner as an order issued by the responding tribunal. FCA §580-603(b)
- B. The law of the state which issued the controlling order governs the amount of interest charged on any arrearages. FCA §580-604(2)
- C. Registration of an order does not require personal jurisdiction over the nonregistering party
  - 1. Orders may be enforced against property of the obligor without personal jurisdiction. Other remedies require personal jurisdiction.
- D. A Support Collection Unit may administratively enforce an out-of-state or foreign support orders without registration. FCA §580-507(b)

X. Modification of Out-of-State Support Orders

- A. In order to modify an order of another state, the order must be registered for modification as described in Section VIII above. FCA §580-609
- B. A court in this state may modify an order of another court if it has been properly registered for modification and:
  - 1. the following conditions are met (FCA §580-611(a)(1):
    - a. None of the parties or the child live in the issuing state
    - b. The party seeking modification is a non-resident of this state (the “play-away rule”)
      - (1) but see Bowman v Bowman, 82 A.D.3d 144 (3<sup>rd</sup> Dept., 2011), which held that the provisions of FFCCSOA, which do not enshrine the play-away rule, preempt NY’s UIFSA statute.
    - c. The respondent is a resident of this state, or
  - 2. one of the parties or the child(ren) reside in this state and the parties have consented in writing or on the record to allow this state to assume continuing and exclusive jurisdiction (FCA §580-611(a)(2), or

3. all of the parties reside in NYS. FCA §580-613
- C. Once a NYS court modifies the order of another state, NYS assumes continuing and exclusive jurisdiction.
- D. A NYS court may not modify any aspect of an order from another state which could not be modified in the initial issuing state, including duration. FCA §580-611(c)
  1. Once the child has reached the age of emancipation in the initial issuing state, NYS may not issue a new order extending the obligation notwithstanding the fact that NYS may have a later age of emancipation. FCA §580-611(d); Spencer v. Spencer, 10 N.Y.3d 60 (2008)
  2. A state-by-state guide to emancipation ages is available at: <http://www.ncsl.org/research/human-services/termination-of-child-support-age-of-majority.aspx>

XI. Modification of a NYS Order When the Parties and Child(ren) no longer reside in NYS

- A. A NYS Court may modify a NYS child support order if:
  1. One of the parties or the child was a resident of NY when the proceeding was commenced (FCA §580-205(a)(1))
  2. The parties consent on the record or in writing for NYS to maintain CEJ (FCA §580-205(a)(2)), or
    - a. If the parties have consented to another state having jurisdiction, NY may no longer exercise CEJ.
  3. One party resides in another state and the other resides outside of the United States (FCA §580-611(f))
    - a. Note that in this situation, the party living outside of the U.S. would have the option of registering the order in the other party's state for modification.

XII. Foreign Orders of Support

- A. Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Hague Child Support Convention)
  1. Ratified by the US in 2016

2. Enforcement and modification of support orders made by countries that are signatories to the Hague Child Support Convention are provided for in Part 7 of UIFSA (FCA §580-701 et. seq.)
3. A list of Convention countries is available at <https://www.acf.hhs.gov/css/partners/international>
4. Registration and enforcement of Orders from Hague Convention countries
  - a. Unlike Out-of-state orders, foreign orders must be registered before they can be enforced
  - b. The process for registration of foreign orders is the same as for out-of-state orders except that nonregistering parties have 30 days to contest the registration if they reside in NYS and 60 days if they reside outside of NYS. FCA §580-707
  - c. NYS may refuse to recognize Hague County orders on the following grounds (FCA §580-708(b))
    - (1) recognition and enforcement of the order are manifestly incompatible with public policy, including the failure of the issuing tribunal to observe minimum standards of due process, which include notice and an opportunity to be heard;
    - (2) the issuing tribunal lacked personal jurisdiction
    - (3) the order is not enforceable in the issuing country;
    - (4) the order was obtained by fraud;
    - (5) the transmitted record lacks authenticity or integrity;
    - (6) a proceeding between the same parties and having the same purpose is pending before a tribunal of this state and that proceeding was the first to be filed;
    - (7) the order is incompatible with a more recent support order involving the same parties and having the same purpose if the more recent support order is entitled to recognition and enforcement under this article in this state;
    - (8) Alleged arrears have been paid in whole or in part;

- (9) In a case in which the respondent neither appeared nor was represented in the proceeding in the issuing foreign country:
  - (a) if the law of that country provides for prior notice of proceedings, the respondent did not have proper notice of the proceedings and an opportunity to be heard; or
  - (b) if the law of that country does not provide for prior notice of the proceedings, the respondent did not have proper notice of the order and an opportunity to be heard in a challenge or appeal on fact or law before a tribunal; or
- (10) the order was made in violation of section FCA §580-711.

- 5. Modification of an order from a Hague signatory may occur if (FCA §580-711):
  - a. the obligee submits to NYS jurisdiction, either expressly or by defending on the merits without objecting to jurisdiction at the first available opportunity;
  - b. the foreign tribunal lacks or refuses to exercise jurisdiction to modify its support order or issue a new support order

B. Non-Hague Countries

- 1. The provisions for registration, enforcement and modification of Orders that apply to out-of-state orders as detailed above apply to non-Hague Convention countries if:
  - a. They have been declared to be “reciprocating countries.”  
FCA §580-102(5)(i)
    - (1) A list of Foreign Reciprocating Countries is available at <https://www.acf.hhs.gov/css/resource/foreign-reciprocating-countries>
  - b. They have enacted procedures “for the issuance and enforcement of support orders which are substantially similar to the procedures under [UIFSA].” FCA §580-102(5)(iii)

**Prior Law**

- Uniform Reciprocal Enforcement of Support Act (URESAs)
- Revised Uniform Reciprocal Enforcement of Support Act (RURESAs)
- Uniform Support for Dependents Law (USDL)

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**Full Faith and Credit for Child Support Orders Act (FFCCSOA)**

- 28 U.S.C.A. §1738B
- Only one support order permitted (Controlling Order)
- Only one state has Continuing and Exclusive Jurisdiction (CEJ)

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**Uniform Interstate Family Support Act (UIFSA)**

- FCA § 580
- Adopted by NYS in 1997
- Revised version (UIFSA 2008) adopted in 2015
- Replaces URESAs, RURESAs, USDL, etc.

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### Controlling Order

- The most recent order entitled to recognition
- Only one controlling order

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### Continuing and Exclusive Jurisdiction (CEJ)

- Child Support Orders
  - At least one party or child remains in the issuing state
  - Parties may consent to change in CEJ

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### Continuing and Exclusive Jurisdiction (CEJ)

- Spousal Support Orders
  - The issuing state **always** retains CEJ
  - No other state may modify a spousal order

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**Establishment of Paternity/Support**

- Two Methods:
  - Long-Arm
  - Two-State Process

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**Long-Arm Jurisdiction**

- Service in NYS
- Submission to jurisdiction
- Resided with the child in NYS
- Resided in NYS and provided prenatal expenses or support
- Acts or directives
- Child conceived in NYS
- Assertion of parentage in the putative father registry
- Any other basis consistent with NYS or US Constitution

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**Long-Arm Jurisdiction**

- NYS law applies
- Age of emancipation is 21

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**Two-State Process**

- Papers filed with SCU
- SCU forwards papers to the receiving state
- Personal appearance not required
- Responding state’s laws and procedures apply
- Emancipation age of receiving state applies

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**Registration - Filing**

- Two copies, including a certified copy, of the order sought to be registered
- A letter of transmittal (Form UIFSA-1)
  - **Specify what the registration is for.**
- A sworn registration statement (Form UIFSA-9)

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**Registration**

- The clerk sends out a notice of registration with the filed materials
- Nonregistering party has 20 days to file a petition to vacate

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**Registration - Objections**

- The issuing tribunal lacked personal jurisdiction
- The order was obtained by fraud
- The order has been vacated, suspended, or modified
- The issuing tribunal has stayed the order pending appeal
- There is a defense under the law of this state to the remedy sought
- Full or partial payment has been made
- Statute of limitations
- The alleged controlling order is not the controlling order

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**Enforcement**

- SCU may enforce an out-of-state order without registration
  
- When registered, NYS Law applies
  - Except interest, which is determined by the law of the issuing state

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**Modification of NYS Order**

- One of the parties or a child remain in the state
- When no one lives in the state, if the parties consent to NYS jurisdiction
- If one party resides in another state and the other outside the U.S.

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**Modification of Order of Another State**

- NYS is the residence of one of the parties or children
- Parties consent to NYS assuming jurisdiction

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**Modification of Order of Another State**

- NYS is the residence of all the parties
- Child does not reside in issuing state

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**Modification of Order of Another State**

- None of the parties or children reside in the issuing state
- Petitioner is **not** a resident of this state (the "play-away" rule)
- Respondent is subject to NYS jurisdiction

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**Bowman v Bowman**

- 82 A.D.3d 144 (3rd Dept., 2011)
- The provisions of FFCCSOA, which do not enshrine the play-away rule, preempt NY's UIFSA statute
- May not apply post-UIFSA 2008

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**Modification of Order of Another State**

- NYS may not modify emancipation age!

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**Foreign Orders - Hague Convention**

- Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance
- Ratified by the US in 2016

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**Hague Convention -  
Registration and Enforcement**

- Registration of foreign orders is the same as for out-of-state orders.
  
- Nonregistering parties have 30 days to contest the registration if they reside in NYS and 60 days if they reside outside of NYS.

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**Hague Convention -  
Contest of Registration**

- Incompatible with public policy
- Lack of personal jurisdiction
- Not enforceable in the issuing country
- Order was obtained by fraud
- Transmitted record lacks authenticity or integrity
- A proceeding between the same parties is pending before another Court
- Order is compatible with a more recent support order entitled to recognition
- Alleged arrears have been paid in whole or in part
- Lack of Notice
- Order violated modification provisions in FCA §580-711

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**Hague Convention  
Modification of Foreign Orders**

- Obligee submits to NYS jurisdiction
  
- Foreign tribunal lacks or refuses to exercise jurisdiction to modify

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## **Representation in Family Court Proceedings**

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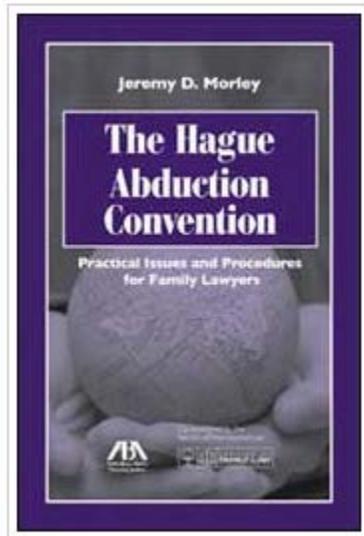
### **UCCJEA & Hague Convention**



## How to Win a Hague Convention Child Abduction Case

by Jeremy D. Morley

Author of *The Hague Abduction Convention: Practical Issues and Procedures for Family Lawyers*, published by the American Bar Association.



**Here are some tips for attorneys and clients faced with instituting or defending child abduction proceedings under the Hague Convention on the Civil Aspects of International Child Abduction, whether in the United States or internationally.**

In a nutshell, a Hague Convention application may be made when a child is taken or retained across an international border, away from his or her habitual residence, without the consent of a parent who has rights of custody under the law of the habitual residence, if the two countries are parties to the Convention. The child must be promptly returned to the habitual residence unless the return will create a grave risk of harm to the child or another limited exception is established.

### **1. CHOOSE THE RIGHT REMEDY**

If a child has been abducted to the United States, it might be preferable to proceed under the Uniform Child Custody Jurisdiction & Enforcement Act (adopted by all U.S. states except Massachusetts, which has adopted a prior uniform law) instead of the Hague Convention. That Act provides remedies that may be far more useful than those provided under the Hague Convention. You may also be able to proceed under one track and if that does not succeed to then proceed under the other track. But it is absolutely critical to consult first with a U.S. lawyer who understands the issues, who has lots of experience handling these matters, who can make sure that critical dates do not lapse and who can recommend the most appropriate strategy.

### **2. ACT FAST**

An attorney must be ready to file a Hague Convention application and institute or defend a Hague Convention lawsuit on extremely short notice.

Prompt action may be critical. The Convention specifically requires that hearings be conducted expeditiously. Indeed, it is recommended that Hague cases be completely concluded within six weeks. A Hague case can theoretically be instituted more than a year after the abduction but a defense (or, more precisely, an exception) will then arise if the child has become settled in the new environment. In practice, the longer a child is in a new place the more likely it is that a court will be reluctant to send the child away.

Fast action by the left-behind parent is also necessary to help prevent a claim that the parent has acquiesced in the child's relocation, and to help to bolster a claim that the left-behind parent consented to the taking or retention in the first place.

Clients must move quickly to obtain the documents needed to file the initial application and then to collect the documents needed for the hearing. They should normally be asked to prepare a detailed family history and to assist the attorney to develop evidence as rapidly as possible.

Counsel should consider putting the abducting parent on immediate written and formal notice of the dire consequences, civil, criminal and financial, that the abduction will cause to that parent personally, and, possibly to others conspiring with the parent. It may be appropriate to provide an extremely short time for the abducting parent to cure the problem by returning the child. On the other hand, such notice might be counter-productive if there is a suspicion that the taking parent might hide the child.

Counsel must also decide quickly whether to bring suit in state or federal court. The International Child Abduction Remedies Act provides for concurrent jurisdiction. If a state court is chosen the respondent has the absolute right to remove the case to the federal court. Choosing the right court can make all the difference in a Hague case.

Counsel might enlist the support of the U.S. State Department's Office of Children's Issues. Such support may be particularly helpful to locate the child. It might also be useful if the left-behind parent seeks a U.S. visa to enter the United States in order to attend the trial.

Counsel might also suggest that, if there is no custody order in place from a court in the jurisdiction of the habitual residence, the left-behind parent should perhaps institute civil proceedings in those courts for such an order (or perhaps for a modification of the original order). However, this should not be undertaken without U.S. counsel conferring with counsel in the other country.

### **3. COMMUNICATE CAUTIOUSLY WITH THE OTHER PARTY**

Hague cases can be won or lost in the emails and text messages and other communications between the parties after the abduction has occurred. People often make critical (and perhaps stupid) admissions or threats in the immediate aftermath of the removal or retention of a child, when emotions run high and when they try to intimidate or settle with the other party. Judges often rely far more on the parties' contemporaneous written statements than their subsequent rehearsed testimony at trial. Clients must be careful! They need to consult first with highly experienced and strategic counsel.

### **4. CONSIDER INTERIM RELIEF**

The International Child Abduction Remedies Act expressly authorizes the state or federal court handling a Hague case to order "provisional remedies" to protect the well-being of the child or to prevent the child's further removal or concealment before the final disposition of the petition.

Such an order should invariably be sought in order to keep the child in the jurisdiction pending the hearing of the Hague petition but a left-behind parent will also want to secure interim access to the child.

### **5. PREPARE THE FACTUAL PRESENTATION INTENSELY**

Hague Convention cases are often extremely fact-intensive, particularly in the United States. They frequently hinge on the ability of one party to convince the court of matters such as the habitual residence of a child (which hinges in large part in most but not all circuits on the last shared intention of the parents); the nature of the left-behind parent's custody rights under the foreign law (which may

require expert evidence as to the terms of the foreign law); the extent to which a parent actually exercised custody rights; whether or not a parent consented to or acquiesced in a new residency; whether such consent or acquiescence was conditional; whether the child has become well settled in the new environment; whether the child was physically or psychologically abused; whether the taking parent was abused in such a way that there was an impact of the child; whether the authorities in the foreign country provided adequate protection to the children and the taking parent in the past or could do so in the future; the age and maturity level of the child, whether and why the child objects to being returned. For a court to resolve these matters it must analyze the relevant facts.

A successful Hague proceeding requires the attorney, working closely with the client, to marshal as much evidence as possible, in as many forms as possible, to support the client's position. Clients are frequently shocked that matters that to them are obvious and indisputable turn out to be disputed and to require them to produce clear and convincing proof. They may well be insulted that their word alone is insufficient to convince the court that they are truthful and that the other parent is lying.

In one case, the parents had moved permanently with their young child from the mother's native country to the U.S. Two years later, the mother took the child back to her country for a vacation and then refused to return to the States. In supporting her claim that the child was never habitually resident in the States she claimed that the original move to America had been only temporary and that she and the father had agreed that they would return to the mother's native country after a year or two. The mother had planned the move well in advance and had amassed -- and even created -- evidence that tended to support her claims. Additionally, she had removed evidence from the parties' home that would have disproved her claims.

To win the case, we interviewed neighbors, friends, family members, schoolteachers, real estate salespeople, fellow office workers and an array of other people who had had some connection with the family. We checked into any and all areas of the mother's life for anything that might indicate her intention to stay in the States. We obtained emails, notes, invoices, and other documents. We searched old household bills for evidence of the purchase of items that inferred a degree of permanency. At the hearing, the mother was shocked that her husband had collected so much written evidence to disprove her claims and undercut her credibility. The courts ultimately -- and with great reluctance, since they were going against a local national -- found in favor of our client.

Since Hague cases are tried quickly, there is usually only one chance to present the case and it needs to be done well at the very outset. An attorney must embark on a quick campaign of collecting mounds of relevant evidence to support the client's positions, and must expect the other parent to lie, cheat, and distort the facts in a desperate attempt to avoid losing the case.

Just as a current military strategy is to employ overwhelming force to create shock and awe, so too in a Hague Convention case it is often advisable to use overwhelming amounts of evidence to win the case. Such a campaign in a Hague proceeding may yield a capitulation by the other parent even before the hearing actually commences.

Hague Convention hearings sometimes take the form of "he said, she said" disputes in which each side makes verbal accusations against the other. Documentary evidence is usually far better than the mere word of one parent. Thus, if you want to claim that a parent applied for an immigration visa, you must be prepared to do more than simply have the parent tell the court that this was done. You should do

whatever you can to get hold of the actual application papers that the parent signed in applying for the visa, which may mean contacting the lawyer who handled the immigration matter originally.

Emails and text messages can be invaluable sources of critical evidence, especially concerning the parents' intentions and agreements.

While it is helpful if documents are supported by sworn statements, it is not essential. Both the Convention and the International Child Abduction Remedies Act provide that authentication of documents is not required in a Convention proceeding.

## **6. DISCOVERY**

Since Hague Convention cases in the United States are often extremely fact-specific, pre-trial discovery can be extremely important and helpful, especially in order to obtain documents to use at trial and to pin down the other side's positions. Pre-trial discovery is generally permitted in Hague cases in the United States, though rarely in other countries, but its appropriateness must be balanced against the requirement that Hague cases should be concluded quickly. It is essential to decide at the outset of a case whether discovery is really needed because it should normally be requested at the time of the initial appearance before the court or otherwise it might be waived.

## **7. PREPARE THE LEGAL ARGUMENT INTENSELY**

Hague Convention cases raise unusual international law, foreign law and treaty law questions. They involve the courts in matters of a kind that they are usually not used to handling. In many jurisdictions the court may be entirely unfamiliar with Hague cases. Accordingly it is usually essential for the lawyers to help the court to an unusual extent. Certainly a well-reasoned memorandum of law is essential.

The matters in dispute in most Hague cases raise difficult legal issues that must be thoroughly briefed. For example, the Convention requires the left-behind parent to establish that the child was taken from the "habitual residence" and that the parent had "rights of custody" under the law of that jurisdiction. However, neither of those fundamental terms is defined in the Convention and substantial jurisprudence has grown domestically and internationally setting forth often-contradictory determinations concerning their scope and meaning.

Courts have held that, while they must determine under international law whether the left-behind parent possesses Hague Convention "custody rights," they must first examine the law of the child's habitual residence in order to ascertain the extent of the rights that such parent possesses under that law. In this regard, it is often essential to use foreign law experts to establish the existence and scope of such rights.

A Hague Convention attorney may, and often should, cite cases not only from the domestic jurisdiction but also from other jurisdictions if they support the client's position. It has become more usual to cite cases from other jurisdictions in this area of the law than perhaps in any other. Courts around the world recognize that it is best to coordinate their decisions with those of other courts internationally and, for that very reason, the Hague Conference on Private International Law has established a database of significant Hague cases from courts around the world.

## **8. AVOID BEST INTERESTS ANALYSIS**

In representing the left-behind parent in a Hague proceeding, it is necessary to keep the court focused on the narrow issues that the Convention requires an applicant to establish and the narrow defenses that a respondent can assert. Whenever the hearing strays into any areas that might be considered as constituting an analysis of the child's best interests, the other party (usually the petitioner) should vehemently object. This may be especially "foreign" if the Hague case is brought in a state court, since Family Court judges are trained to focus on the best interests of children more than on technical legal arguments.

However, a party opposing a return should do his or her utmost to assert any and all relevant issues under the rubric of one of the defenses specified in the Convention and should be armed with case law to establish that similar claims were permitted in other cases.

#### **9. BE FLEXIBLE CONCERNING EVIDENCE**

In Hague cases evidence rules are usually somewhat relaxed, so evidence should be submitted in any possible format. Live testimony is invariably the best and normally everything should be done to get the left-behind parent into the courtroom. (An exception is if that parent would be a poor witness and his or her presence would create an opportunity for embarrassing cross-examination).

If a witness cannot be brought to the courthouse, consider testimony by video conferencing or otherwise by telephone conference. As a last resort, submit affidavits.

#### **10. USE AN EXPERIENCED ATTORNEY: IF THAT'S NOT YOU, FIND SOMEONE WHO IS**

Hague Convention cases happen too fast, and too much is at stake for the client, for an attorney to learn about this area of law at the last minute. It is extremely important to locate counsel with knowledge and experience in Hague proceedings. It is also frequently valuable for a client whose child has been abducted to retain a lawyer in his or her home country who can coordinate with the Hague counsel in the country to which the child has been taken.

Many experienced Hague lawyers will assist local lawyers in handling Hague cases, and very often such teamwork is the best way forward.

## Mirror Orders to Help Prevent International Child Abduction

by  
Jeremy D. Morley**(1)**

"Mirror" orders can be a useful tool in the arsenal of lawyers who handle cases concerning international child travel and the prevention of potential international child abduction.

Increasingly courts are being asked to enjoin parents from taking children overseas because of a parent's fear that the children will not be returned. Courts must take such applications extremely seriously, especially if a child is likely to be taken to a country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction, or that does not return children promptly to their habitual residence. On the other hand it is also well-recognized that children have an interest in seeing the world and that children with a foreign parent should be encouraged to learn of their overseas heritage and to get to know their distant family.

A potentially left-behind parent's application for an injunction is usually supported by: (a) Expert testimony as to the practices and laws concerning international child abduction and international child custody in the country to which the child may be taken **(2)**; (b) Expert testimony as to the "red flags" or "risk factors" that research establishes are the indicia that a particular parent might indeed abduct his or child; and (c) Lay testimony as to any facts that establish the existence of any and all such risk factors.

In such cases, a judge will invariably ask a basic question: "What conditions can I include in my order that will minimize the risk that the child will be returned?" Unfortunately, the true answer is often "None" -- as evidenced by the epidemic of "successful" abductions to countries such as Japan, frequently in flagrant violation of court orders.

However, in many cases, a useful suggestion is that the order should require the taking parent to obtain a "mirror order" from a court in the foreign jurisdiction before being allowed to take the child overseas.

A mirror order is one that is issued by another court which contains the same terms as those that are contained in the order that is being mirrored. Inherent in the mirror order concept is the fact that the foreign court shall have the right -- and more importantly the obligation -- to enforce the terms contained in the order, specifically including the obligation to effectuate the prompt return of the child at the end of a designated period of time. Equally critical is that the foreign court should not be permitted to modify the original order.

The viability of such a requirement varies substantially from country to country. Thus a very recent decision of the Supreme Court of India makes it clear that the courts in India will not allow mirror orders to be entered in child custody matters and that they will always conduct a full plenary review of the child's best interests (which invariably equate to a decision that the child -- who, by the time of the ultimate decision has typically been in India for some years -- should remain in India).**(3)**

It is also obvious that a court in Japan, even in the utterly unlikely event that it were to issue a mirror order, would not enforce the terms of any such order since its family law system is toothless and its orders are invariably not enforced.**(4)**

By contrast, a country such as Australia has a custody registration system that operates in a very similar

way to the system of registration of foreign custody orders in the Uniform Child Custody Jurisdiction & Enforcement Act. However, Australia is very much the exception rather than the rule. The European Union has a registration system but it applies only to orders issued by an E.U. court and the practice within Europe varies substantially from country to country.

Indeed, foreign lawyers are generally shocked and amazed when they learn of the registration provisions in the UCCJEA. In particular, they are often shocked that a U.S. court will generally have exclusive continuing jurisdiction for many years after a child has left the jurisdiction as long as one parent continues to live there. The issue was recently before the Court of Appeal in England. **(5)** Since that Court is headed by a judge who is also that country's "Head of International Family Law" its decisions on such issues are far less like to be parochial than similar rulings from some courts in the United States and many other countries.

In the English case, the child was living in Malaysia. A Malaysian court gave custody to the father, an English national, and contact to the mother "at reasonable times". The father then asked an English court for a mirror order so that he could apply for a British passport for the child. However, the English court not only issued a mirror order but it also granted the mother's application to reopen the entire case. On appeal, the English Court of Appeal ruled that the trial court has been right to issue the mirror order but wrong to claim any broader jurisdiction. It made clear that a litigant who seeks a mirror order does not accept the jurisdiction of the court to do any more than reiterate the provisions of the order issued by the primary jurisdiction. By definition, an application for a mirror order cannot supplant the primary jurisdiction. The Court ruled that if the mother wished to challenge the order or seek specific contact she should apply in Malaysia.

Lawyers bringing applications to enjoin children's foreign travel, and lawyers opposing such applications, need to tailor their presentations and their proposals to the specific laws, procedures, customs and practices concerning international family law, international child custody and international child abduction of the specific country or countries that the child is to visit or may be taken to.**(6)**

Thus, it is important to understand that merely because an American court conditions an event upon a foreign mirror order, the foreign court might not have jurisdiction to issue any such order. That situation arose in *Danaipour v. McLarey* **(7)** in which a district court in Massachusetts acted on the mistaken assumption that a Swedish court would provide a stipulated mirror order but in fact the Swedish court refused to do so.

Another critical factor is that once a child is taken into a foreign country it may be extremely difficult to bring a child home because of the stringent exit controls that many countries have that require the written consent of both parents or a sole custody order to remove a child. This is particularly the case with South American countries. Even if a U.S. court issues the requisite order it may have no effect in a foreign country or, even if ultimately effective, the lack of a local court order might cause significant border delays.

Some examples of issues that have arisen in my office concerning mirror orders are the following:

-A client was legitimately worried that a child would be retained in Bermuda if the father took him to visit his family there. Upon our advice, the client negotiated a strong New York consent order that specified that New York had continuing exclusive jurisdiction, that contained a host of other protective clauses and that permitted a visit to Bermuda only if a mirror order were first obtained.

Subsequently, the father asserted that he had been unable to obtain the requisite mirror order from the Bermudan courts. As a result the Family Court authorized a visit without the mirror order. We successfully obtained from the Appellate Division, First Department an emergency order barring the scheduled visit.

-Our client settled an action under the Hague Abduction Convention by agreeing to limited and supervised visitation between the father and the child in Quebec, Canada, conditioned on the child's prompt return to New York. We insisted that a mirror order be obtained from the Quebec courts before any visit could occur. Again, the father reported difficulty on obtaining the required order, which led to a delay in the scheduled visitation. Only when the mirror order was in place did visitation in Canada successfully occur.

-In many cases I have suggested, as part of my written expert evidence or expert trial testimony, that a mirror agreement would be futile because the family law system of the foreign country could not be relied on to enforce the mirror order. For example, I recently so testified as to China.

-In other cases I have testified that a mirror order might be a good idea because it would provide useful additional security for the prompt return of the child if the parent taking the child for an overseas visit were to keep the child overseas and because the family law system in such country is reliable and effective (e.g. I have so testified as to Italy and Hong Kong).

In conclusion, mirror agreement requirements may be useful depending on the circumstances. But they may also be counter-productive if they induce a false sense of security. They should never be requested or opposed except by counsel having full knowledge and understanding of international family law.

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**(1).** Jeremy D. Morley concentrates on international family law. He may be reached at 212-372-3425. He is the author of the treatise, *International Family Law Practice*. His websites are [www.international-divorce.com](http://www.international-divorce.com) and [www.internationalprenuptials.com](http://www.internationalprenuptials.com). His blog is [www.internationalfamilylawfirm.com](http://www.internationalfamilylawfirm.com).

**(2).** Thus the author has provided such evidence as to many such countries including India, Japan, Colombia, China, Taiwan, Egypt, Italy, Hungary, Saudi Arabia, Mexico, Venezuela, the United Arab Emirates, Jordan and Mexico.

**(3).** *Majoo v. Majoo*, [2011] INSC 515.

**(4).** <http://www.international-divorce.com/Japan-Child-Abduction-police-hurt.htm>

**(5).** *W v W (Minor) (Mirror Order)* [2011] EWCA CIV 703.

**(6).** An example of a critical factor that is often overlooked is that a visit to one country may permit an easy visit to another country. Thus, once a child is in any European country that is within the "Schengen Zone" the child may be taken to any other such country without passing through any passport control.

**(7).** 286 F.3d 1 (1st Cir. 2002).

## New Economist Article on International Family Law

I was recently interviewed in connection with the below article, set to be published in the latest edition of the Economist:

Kate Baggott and her two children live in a tiny converted attic in a village near Frankfurt. Ms Baggott, who is Canadian, has a temporary residence permit and cannot work or receive benefits. The trio arrived in Germany in October, after a Canadian court order gave them a day's notice to get on the plane. Ms Baggott's ex-husband, a Canadian living in Germany, had revoked his permission for the children's move to Canada after they had been there nearly a year, alleging "parental child abduction". A German court has given Ms Baggott full custody, but she must stay until an appeal is over.

Such ordeals are becoming more common as the number of multi-national and footloose families grows. Across the European Union, for example, one in seven births is to a woman who is a foreign citizen. In London, a whopping two-thirds of newborns in 2015 had at least one parent who was born abroad. In Denmark, Spain and Sweden more than a tenth of divorces end marriages in which at least one partner is a non-citizen.

The first question in a cross-border break-up is which country's laws apply. When lots of money is at stake there is an incentive to "forum-shop". Some jurisdictions are friendlier to the richer partner. Germany and Sweden exclude assets owned before the marriage from any settlement. Ongoing financial support of one partner by the other is rare in France and Texas—and ruled out in another American state, Georgia, if the spouse seeking support was adulterous.

Under English law, by contrast, family fortunes are generally split evenly, including anything owned before the marriage. Prenuptial agreements, especially if drawn up by a lawyer representing both spouses, are often ignored. The wife of a Russian oligarch or a Malaysian tycoon can file for divorce in London if she can persuade a judge that she has sufficient links to England. A judge, says David Hodson, a family lawyer in London, might be presented with a list of supporting items, which may be as trivial as which sports team the husband roots for, or where the family poodle gets a trim.

Across the European Union, until recently the rule has been that the courts of the country in which divorce papers are filed first gets to hear the case. Couples often rushed to file rather than attempting to fix marital problems. But in some countries that is changing: last year Estonia became the 17th EU country since 2010 to sign an agreement known as Rome III that specifies how to decide which country's law applies (usually the couple's most recent country of residence, unless they agree otherwise). Though the deal brings welcome clarity, one downside is that courts in one country may have to apply another country's unfamiliar laws. And one spouse may be tricked or bullied into agreeing to a divorce in the country that best suits the other.

The bitterest battles, though, are about children, not money. Approaches to custody vary wildly from place to place. Getting children back if an ex-partner has taken them abroad can be impossible. And when a cross-border marriage ends one partner's right to stay in the country where the couple lived may end too, if it depended on the other's nationality or visa.

### **Treasures of the heart**

Under the Hague Abduction Convention, a treaty signed by 95 countries, decisions about custody and relocation fall to courts in the child's country of "habitual residence". If one parent takes a child abroad

without the other's consent or a court order, that counts as child abduction. The destination country must arrange the child's return.

But plenty of countries have not signed, including Egypt, India and Nigeria. They can be havens for abducting parents. Around 1,800 children are abducted from EU countries each year. More than 600 were taken from America in 2015; about 500 abductions are reported to American authorities each year the other way round.

Some countries, including Australia and New Zealand, often regard themselves as a child's "habitual residence" from the moment the child arrives. The EU sets the threshold at three months. America differs from state to state: six months' residence is usually what counts. GlobalARRK, a British charity that helps parents like Ms Baggott, is campaigning for information on such rules to be included among the documents issued to families for their move abroad. It also lobbies for a standard threshold of one year for habitual residence and advises parents to sign a pre-move contract stating that the child can go home at any time. Though such contracts are not watertight, they would at least alert parents to the issue.

Britain is comparatively helpful to foreign parents who seek a child's return: it provides help with legal advice and translation. But plenty of countries do little or nothing. Family judges in many places favour their compatriots, though they may dress up their decisions as being in the child's interests. Parents who can no longer pay their way through foreign courts may never see their children again.

Some parents do not realise they are committing a crime when they abscond with the children, says Alison Shalaby of Reunite, a British charity that supports families involved in cross-border custody disputes. Even the authorities may not know the law. Michael, whose former partner took their children from Britain to France in 2015, was told by police that no crime had been committed. After he arranged for Reunite to brief them, it took more than five months to get a French court order for the children's return.

Other countries are slower still, often because there are no designated judges familiar with international laws. Over a third of abductions from America to Brazil, for example, drag on for at least 18 months. When a case is eventually heard the children may be well settled, and the judge reluctant to order their return.

A renewed push is under way to cut the number of child abductions, and to resolve cases quickly. The EU is considering setting an 18-week deadline for the completion of all return proceedings and making the process cheaper by abolishing various court fees. And more countries are signing up to the Hague Convention: Pakistan, where about 40 to 50 British children are taken each year, will sign next month. India, one of the main destinations for abducting parents, recently launched a public consultation on whether to sign up too.

But the convention has a big flaw: it makes no mention of domestic violence. Many of the parents it classifies as abductors are women fleeing abusive partners. One eastern European woman who moved to Britain shortly before giving birth and fled her violent fiancé four months later, says she was turned away by women's shelters and denied benefits because she had lived in Britain for such a short time. For the past year she has lived off friends' charity. The police have taken her passport to stop her leaving Britain with the baby. Another European woman, living in New Zealand, says she fears being deported

without her toddlers when her visa expires in a few months. She fled domestic abuse with the children and a bag of clothes in December, and has been moving from one friend's house to another ever since. Child abduction is often a desperate parent's move of last resort, says GlobalARRK's founder, Roz Osborne. One parent, who has residence rights, may have been granted sole or joint custody, meaning the children cannot be taken abroad without permission. But the other parent may have entered on a spousal visa which lapses when the marriage ends. Even if permission to remain is granted, it may be without the right to work or receive state benefits. In such cases, the decision of a family court guaranteeing visiting rights or joint custody can be close to meaningless.

Britain's departure from the EU could mean many more divorcing parents find themselves in this desperate state. Around 3.3m citizens of other EU countries live in Britain, and 1.2m Britons have moved in the opposite direction; so far it is unclear whether they will continue to have the right to stay put and work. **And in America, says Jeremy Morley, a lawyer in New York who specialises in international family law, immigration issues are increasingly used as weapons in child-custody cases. Judges in family courts, he says, often pay little attention to immigration issues when ruling on custody, because they know few people are deported solely because their visas have expired.** But under Donald Trump, that may change.

Many parents have no idea what they sign up for when they agree to follow a spouse abroad, says Ms Osborne. They may mistakenly believe that if things do not work out, they can simply bring the children back home. Ms Baggott's move to Germany was supposed to be a five-year adventure, the duration of her husband's work visa. Instead, she says, she endured "a decade of hell".

<http://www.economist.com/news/international/21716991-parents-can-face-lengthy-court-battles-or-become-permanently-estranged-their>

## Preventing International Child Abduction

By Jeremy D. Morley

International family law is expanding as people travel more and spend time with people from different countries. International personal relationships produce an abundance of conflict and litigation. It is hard enough for people to live together when they share a similar background, but it is far harder when they are from different countries, cultures, religions, ethnicities, educational experiences, languages, traditions, and family structures. The resulting pressures may become especially acute when international couples have children and disagree about such matters as child-rearing methods, the role of in-laws, proper education, religious issues, and ultimately the desire of one of them to take the children “back home” to his or her country of origin.

When international personal relationships dissolve, the legal work is often extremely challenging. I have focused on such work for many years and have found it a great way to leverage my international know-how and experience gained as an Anglo-American national with a Japanese wife and children of various citizenships, who has lived, worked, studied, and run businesses around the world and who has taught law on three continents.

The financial aspects of international family law disputes are often complex and difficult to resolve. But when children are the subject of such disputes, the challenges are often greater and the emotions generally run far higher. Simply put, money can be divided but children cannot. Divorcing parents who stay in the same town can often make sensible arrangements to share the parenting of their children, and if they cannot, a local court can issue appropriate orders and also enforce them as needed. But when the parents cannot even agree on which country to live in, all bets are off.

I represent many parents who live in desperate fear that the other parent will abduct their child to another country and that they will never see the child again. I also represent many parents who desperately want to “go home” with their child to their country of origin.

### **What Law Governs?**

When an international client asks as basic a question as, “What law governs our case?” the answer may well be far from clear. We must often advise that it will depend overwhelmingly on which court—or courts—will have jurisdiction over the case. Although the courts in the state in which the child is currently located have exclusive custody jurisdiction from their own perspective, if the child is taken to visit another country, the courts there will often have jurisdiction under the local law of that country to determine what is best for the child. In addition, these cases often have a strong international law component: More than 80 countries, including the United States and most developed countries, have adopted the Hague Convention on the Civil Aspects of International Child Abduction, which requires that children who have been “wrongfully taken” or “wrongfully retained” overseas should normally be returned promptly to their country of habitual residence.

In practice, international child custody cases often yield complex and messy conflicts between the laws and courts of different countries, demonstrating serious clashes of societal views about culture, religion,

gender roles, parental rights, and children's rights, as well as of the role of the legal system in intervening in disputes about children.

### **Prevention of Abduction**

An increasing number of cases involve the prevention of international child abduction. Let's assume that you receive a frantic call from a client somewhere in the United States, who tells you, "I'm sure my spouse is about to take our child to [India/Japan/China/Colombia/England/Germany] and they will never come back. Please help!" What do you do? Your initial advice may well be purely practical. It will be designed to prevent the immediate threat.

Some issues to cover are:

- You must discuss the passport issue. Most likely you should talk about how to secure the child's passport. You might discuss the location of the other parent's passports (recognizing that it is that person's property). You will need to alert the client to the fact that control over passports does not create complete security because many foreign consulates issue renewal passports or other travel documents to their own nationals, without requiring the consent of the other parent and frequently even in the face of a U.S. court order. You should discuss how the U.S. State Department's Office of Children's Issues might help ensure that no new U.S. passports are issued.

- You should talk about how to track the child's whereabouts. Who can watch the child? Should you alert school authorities? What about placing a GPS tracking device in the child's clothing or cell phone? What about alerting the police or hiring a private investigator?

- Perhaps your client should contact the airlines to discover if the other parent has bought airline tickets for the child. Perhaps you should write to the airlines to demand that they prevent the child from boarding.

- You should discuss whether your client should contact other family members about the issue and what to say to them.

- You should advise your client how to instruct the child as to what to do in case of an emergency.

- You should advise your client about collecting and securing evidence for a potential court hearing.

You may well want to secure an emergency restraining order very promptly from the family court. An initial temporary order should be easy to secure, but it will be far more difficult to keep such an order in place over the long term or to ensure that it has sufficient teeth to be effective. The United States has no exit controls, with certain exceptions, and a mere court order will not trigger the kind of effective checks that other countries have in place to prevent children from being taken out of the country by one parent or family member. Ideally the short-term solution should be to give sole custody to your client and to require that any access by the other parent be strictly supervised.

## Burden of Proof

The long-term burden will be strongly on your client to present compelling evidence sufficient to justify what the court will likely see as extraordinary relief. That evidence must be of two distinct types. First, you must establish that the other parent represents a serious risk of being an international child abductor. Second, you must show, if appropriate, that the foreign country's legal system will not return an abducted child at all or will do so only after great delay and expense. There will be a significant interplay between these two factors. The more that you establish a strong likelihood that the other parent will abduct the child, the less evidence you should need that the country in question presents a high degree of risk. So if the potential country is one such as England or New Zealand, which have strong and effective laws and systems in place to return abducted children, you will likely need very strong evidence of an anticipated abduction. Conversely, if the country presents an obviously greater risk of not returning an abducted child (think Japan or Venezuela), much less evidence of the likelihood that the particular parent will be an abductor should be required.

Your evidence concerning the specific parent should focus on establishing as many of the so-called risk factors as possible. These factors are well established and have been codified in the Uniform Child Abduction Prevention Act (UCAPA). The most compelling evidence would be clear proof of a threat to abduct. Surprisingly, some parents make explicit threats in e-mails. More typically you will need to build a circumstantial case based on such factors as the parent having moved money overseas, vacated a residence, made international job inquiries, retained few ties to the United States, or kept strong connections to the foreign country and community, or being disdainful of the United States.

In order to show that the foreign country's legal system will not return an abducted child at all or will do so only after great delay and expense, you will start with the Hague Convention. It will be highly significant if the country has not signed the Convention or if the United States has not accepted its accession. However, just because a country has signed the Convention does not mean that it will enforce it. As a signatory, Mexico is obliged to return abducted children promptly; in reality, it does not do so, as the U.S. State Department has repeatedly reported.

Likewise, just because a country has not signed the Convention does not necessarily mean that it will not return abducted children. For example, Singapore's courts followed the spirit of the Convention even before Singapore signed the treaty.

Frequently you will need to ask the court to consider and evaluate the real facts as to a country's legal system. Generally speaking, U.S. judges are extremely uncomfortable evaluating another country's legal system and predicting the results that may be expected of a case overseas. Although such reluctance is perfectly understandable, it must be overcome. It is absolutely essential in this area that judges should not shirk from their responsibility to judge whether or not a child is likely to be returned from abroad if a parent or others in his or her family decides to keep the child in that country.

How do you prove that a foreign country's legal system in international child custody cases is ineffective, corrupt, or slow? How do you establish the extent to which the courts in another country will recognize and enforce foreign—and especially U.S.—judgments, particularly in the family law area? Or the extent

to which discrimination—sexual, religious, ethnic, or national—might impact the issue in the courts of that country?

And how do you convince a court that it is both appropriate and necessary for it to act as a judge of the legal systems in place in other countries?

Expert testimony is the key. For example, in a case in Ontario, Canada, a mother sought to prevent the child's father from taking the child to visit his family in India. Counsel for the mother presented my expert affidavit as to India's law and practice concerning international child abduction to that country. Based on my experience with similar cases and my research on , I opined that if the child were kept in , the authorities there would be most unlikely to secure his return. The court ultimately decided to prevent the proposed visit, relying primarily on my expert opinion, which, it said, "unequivocally outlined the many challenges, frustrations—and indeed roadblocks—which the Applicant would face in attempting to secure [the child's] return if the Respondent elected not to return the child from India."

### **Representing the Other Parent**

What if you are representing the other side in these cases? Perhaps your client genuinely wants to take the child for a limited family visit to his or her country of origin. Or perhaps your client came recently to the United States from another country with an American spouse, and now that the relationship is over wants to "return home" with the child.

In any such case you will need to explain how the U.S. legal system works in the area of child custody. Often you will need to encourage the client to use the system and to explain the grave dangers of disrespecting that system. The client will often say, "It's my child. I'm the one who looks after him. The other parent is never around. Why on earth should I have to go to court to ask for permission?"

You may well need to discuss with the client that acting unilaterally might lead to a criminal as well as civil difficulty. For example, the International Parental Kidnapping Crime Act of 1993 makes it a federal felony to remove a child from the United States with intent to obstruct the lawful exercise of parental rights. Once a federal warrant is issued, Interpol may issue a "red notice" seeking the person's arrest wherever found.

If a client tells you that he or she intends to covertly take and retain a child overseas, you need to exercise great care—you may have a duty to report the planned felony to the police, notwithstanding the attorney-client privilege.

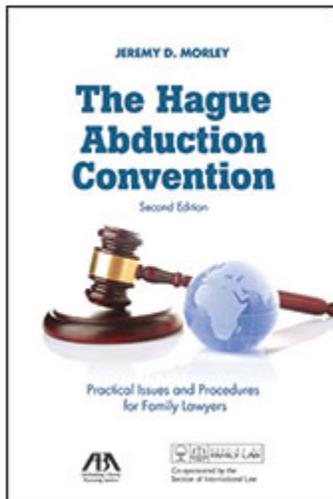
In presenting an application to a court for a temporary visit with a child overseas, you will present those facts and those arguments that show that the client is unlikely to abduct and that the country in question is one that respects U.S. custody orders and returns abducted children. In a case for an Italian client living in New York, I offered testimony that Italy was in full compliance with the Hague Convention and that its performance was significantly better than that of the United States. The court accepted my expert testimony and authorized the visit.

If the request is for relocation, the burden of proof on the applicant is far higher. Domestic child relocation cases are generally difficult to win, and international relocation cases are much more so. They often require lawyers to present evidence as to the legal, social, cultural, political, economic, religious, and educational environment of a foreign country and, in particular, as to whether a U.S. custody order will be recognized and enforced in that country. It is generally a major mistake for a lawyer to present any such case without having worked intensely with the client to prepare an attractive relocation package. The plan should demonstrate the serious steps that the parent has taken to secure optimal conditions for the child and the client in the proposed new location. Equally important, it should establish that the taking parent will not merely permit the left-behind parent to participate in the child's life but will actively encourage and genuinely promote such ongoing contact.

### **Conclusion**

In this article I have been able to provide no more than a brief introduction to a fascinating area of the law. International child custody cases are always stimulating and sometimes extremely frustrating. But when a client e-mails to say, "Thanks to you, my children are safe" or "Blessings, thanks to you, I got the kids back," they can be the most rewarding cases of all.

## The Hague Abduction Convention, Second Edition, by Jeremy D. Morley



[The Hague Abduction Convention, Second Edition](#), provides a clear explanation of how the Hague Convention on the Civil Aspects of International Child Abduction works in the United States.

Hague cases require an intimate knowledge of the Convention and of the voluminous case law that has developed around it. Hague cases also require a complete understanding of international child custody law in general and in particular, for U.S. practitioners, of the relationship between The Hague Convention and the Uniform Child Custody Jurisdiction & Enforcement Act.

The Convention operates in the U.S. in ways that differ from those in other Hague countries. This is because of the federal legislation that implements the treaty, the concurrence of federal and state jurisdiction, the lack of a specialized group of judges who handle cases under the Convention, the uniform state legislation on child custody jurisdiction, and a host of other factors.

### **Purpose of the Book**

The purpose of the book is to explain as clearly as possible to family lawyers how the Hague Convention on the Civil Aspects of International Child Abduction works in the United States. The Convention operates in this country in ways that are different than in other Hague countries. This is because of the federal legislation that implements the treaty, the concurrence of federal and state jurisdiction, the lack of a specialized group of judges who handle cases under the Convention, the uniform state legislation on child custody jurisdiction and a host of other factors.

### **Voluminous Litigation**

The treaty itself is short and to the point. Indeed, there are only three articles that legal practitioners really use to any significant degree in the vast majority of Hague cases, these being Articles 3, 12 and 13. Yet the Convention has spawned voluminous litigation, most especially in the United States. There are several reasons for that.

-The key terms in the Convention are ambiguous and either completely or mostly undefined. One might at first glance expect that straightforward terms such as “habitual residence,” “rights of custody,” and even “grave risk” might be easy to apply in a consistent manner. That has proven not to be the case. The key terms have been subjected to a cascade of judicial interpretation in the United States, which has sometimes been contradictory and often confusing.

-The United States allows Hague cases to be brought before unspecialized judges with no experience in handling them. Somewhat hypocritically the U.S. State Department asks other countries to limit the courts or judges that can handle Hague cases in their countries and to train those judges in how to handle these cases, but there is no such limitation or specialization in the United States. Federal and state courts have concurrent jurisdiction and Hague cases can go to whichever court in a local county handles family law matters. Since there are several thousand such counties as well as many federal districts, a Hague case can be brought before any one of thousands of courts in the United States.

-The Supreme Court has never ruled on the key issue in most Hague Convention cases, which is that of determining the “habitual residence” of the child. The treaty is supposed to have one autonomous meaning on a global level, but the common law system, which allows interpretation to develop on a case-by-case basis, seems not to work so well when decisions are supposed to yield a consensus in an international environment. The situation is rendered far worse than one might have expected because the U.S. Supreme Court has declined to handle all but one case. This has allowed the federal circuits to go off in various directions, with no guidance from the only court that could “lay down the law.”

-Even though the treaty is intended to be merely procedural in nature, parents who have brought their children to another country in search of a “better” forum than the ones available in the former residence may be desperate to prevent the children – and the cases concerning the custody of their children – from being sent back to that foreign forum. Likewise the parents of children who have been snatched by the other parent may be just as desperate to have the “home court advantage” of having their child custody case being heard “at home” instead of “away.” The differences between the custody decisions that are rendered in the courts of different countries are theoretically minimal, yet parents suspect – sometimes misguidedly, but often with extremely good reason – that in the real world the outcomes will be completely different depending on which country’s courts decide the case.

-When children are the subject of international family law disputes, the challenges are often great and the emotions generally run high. Simply put, money can be divided but children cannot. Divorcing parents who stay in the same town can often make sensible arrangements to share the parenting of their children, and if they cannot, a local court can issue appropriate orders and also enforce them as needed. But when the parents cannot even agree on which country to live in, all bets are off. Consequently Hague cases are often litigated.

-Neither the Convention nor the International Child Abduction Remedies Act which brought the Convention into U.S. law, contains any provision for mediation. Currently attempts are under way to implement programs for mediation of Hague cases but they are not yet much utilized. There are special challenges to the use of mediation in Hague cases because the cases are required to be concluded with great speed and a petitioner generally does not want to yield on that and the opportunities for compromise are limited in this area because a child can realistically live in only one country at a time.

### **Handling Hague Cases**

Handling Hague abduction cases is challenging and fulfilling. Hague cases are usually tried very quickly. Indeed, they are supposed to be entirely concluded within just six weeks. They require an intimate knowledge of the Convention and of the voluminous case law that has developed around it. They also require a complete understanding of international child custody law in general and in particular, for U.S. practitioners, of the relationship between the Hague Convention and the Uniform Child Custody Jurisdiction & Enforcement Act.

The Convention is misunderstood by very many family lawyers and, dare I say it, by family judges. A lawyer in a Hague case sometimes needs to provide a quick but respectful education to judges who have not handled any or many such cases before.

I have had the good fortune to have handled Hague cases in many jurisdictions throughout the United States and sometimes in foreign countries also, usually working collaboratively with local lawyers in each jurisdiction. I have also submitted expert evidence in many cases around the world where

compliance with the Convention, either past or contemplated, has been an issue. Additionally, I have lectured on the Convention before federal and state judges in New York State, at international conferences of family law practitioners and at venues such as the Foreign Ministry of Japan. It is fulfilling and exciting work.

## **Plight of the Expatriate Spouse**

**By  
Jeremy D. Morley**

International child relocation applications raise substantially different issues from those raised in domestic relocation cases, whether intrastate or interstate. Unfortunately, the fundamental differences are not often adequately appreciated by lawyers and judges. This is partly because both domestic and international applications are governed by the same legal principles. It is also because, even in today's globalized world, international relocation applications are relatively unusual.

A key difference between international and domestic cases concerns the nature of the applicant. Parents who apply for international relocation have fundamentally different circumstances, concerns and needs than do parents who want to relocate domestically.

A second critical difference is that while sister states have similar laws and legal systems, the legal systems in foreign countries vary dramatically in their recognition and effective enforcement of U.S. custody and access orders. This factor will be the subject of a subsequent article.

### **SPECIAL CIRCUMSTANCES OF THE APPLICANT**

Expatriate parents who seek to relocate internationally with their children typically share similar experiences and challenges, which need to be better understood by lawyers who act as their advocates and by judges who decide the fate of their children. (This article does not cover applications by American parents who wish to move overseas for love or work). In my experience, based on counseling very many expats in family crises, applications by expats for international relocation are usually made by mothers who want to return to their country of origin. They seem to fall into three distinct categories. (In an article such as this, there is no way to avoid making generalized observations. The purpose is not to stereotype people, but to promote better understanding of their circumstances.)

### **The Trailing Spouse**

A "trailing spouse" is one who accompanies her husband on an assignment to a foreign country, usually for a limited number of years. The husband has usually achieved significant success in his career and is pleased to improve his situation by making an international move. It is a situation that is often fraught with danger for the trailing spouse.

A typical scenario might be as follows: H and W are Germans and have lived in Germany for all of their lives. H works for a technology company and W is a teacher. They have a two-year-old child (C). H is offered a promotion conditional on his moving to New York for a four-year assignment. W is excited about the prospects of living in the Big Apple but is sad that she will have to leave her teaching job.

Three years later their entire world has changed. H is thrilled with his assignment, loves his job, thrives on being independent of head office and has adapted well to life in New York. His "only" problem is that W is having an entirely different experience.

W is lonely, isolated and miserable. She does not work and is upset that her German teaching qualifications are not transferable to the U.S. She misses her family and her friends in Germany. She has

experienced far more culture shock than she expected. While her language skills are reasonably good, she is finding that English is far more difficult than she realized. She has no one to complain to -- except H, and when she does, H becomes increasingly impatient.

The relationship between H and W has spiraled downward. H comes home later and later. He ultimately has an affair and a divorce and custody case ensues. H announces that he wants to stay in New York, while W wants to go back home to Germany with C, who is now a happy and healthy five-year-old. W is shocked that H refuses to allow her to take C back to Germany. She feels that he cheated her by dragging her to a foreign country and then refusing to allow her to return home with her child. She is furious that he does not appreciate the sacrifices that she has made for his career, that he has broken his vows of fidelity, and that he is shockingly compounding his betrayal by forcing her to live in an alien country without support, family, friends or career.

In court, H opposes relocation on the grounds that C has lived most of his life in New York; all of C's friends are in New York; and C is thriving there, except for the fact that W is moody and silent. H contends that W is being selfish in wanting to take C away from his father to Germany, a place that C does not remember, and away from everything that C knows in his home in New York. H's argument is compelling and often is the winning one, especially if the focus is on C to the exclusion of W. While the court may acknowledge that a happy mother is a better mother, the court often gives more weight to the fact that the couple and their five-year-old child have spent three years in New York.

### **The Romantic Expat**

A "romantic expat" is someone who moves from his or her home country for romance. Perhaps H from Chicago meets W in Japan and convinces her to marry him and move to Illinois. They have a baby, C. Life in Illinois is not what W expected. Americans are "rude, pushy and inconsiderate." Public transportation in Chicago is inconvenient and unpleasant, and she is scared to drive on the busy roads. She has made no friends except for a couple of Japanese women who were on temporary assignment with their spouses and who have been fortunate enough to have gone back home to Japan. She misses her family and friends and finds it hard and stressful to speak in English. She worries that C is being raised as an American and not as a Japanese.

Inevitably the marriage breaks down, and W wants to go back home to Japan with C, who is now aged three. She is shocked when H insists that she cannot do so; after all, she came to this country only because of H and now that he has "let her down," she cannot understand why he wants to keep her a prisoner here.

In court, H presents all of the arguments that the husband in the previous "trailing spouse" scenario presented, with the additional factors that: 1) C has lived his entire life in the U.S.; 2) relocation will remove C not only from H but also from H's family, with whom C has become attached; and 3) Japan has only recently become a party to the Hague Abduction Convention, does not enforce foreign custody or access orders, does not endorse shared parenting and does not effectively acknowledge a foreign father's right to play a significant role in the life of his children.

### **Holdover Expats**

A "holdover expat" is one who left his or her home country for a temporary period of time, perhaps coming to the U.S. to study or on a work assignment. After some years here he or she has a love affair in

the U.S. and decides to stay here.

Perhaps W is from Colombia, came to study in Florida intending to return home when she had a degree. After a couple of years here, she met and married H who asked her to stay in Florida. Their child, C, is two years old when they decide to divorce. Again, W wants to go back home with C, but H is opposed to relocation. H uses the same arguments as the husbands used in the two prior scenarios, but with the added factor that W was already living in the U.S. when H met her and has lived in the U.S. for a longer period of time than the other wives.

### **TYPICAL JUDICIAL RESPONSE**

In all three scenarios, H's arguments are compelling and they often succeed, especially if the focus is on C, to the exclusion of W. As mentioned above, while the courts may acknowledge that a happy mother is a better mother, that consideration is typically trumped by the fact that C lived or remained in the U.S. The courts will focus on the "best interests" of the child without fully appreciating the drastic impact that the mother's unhappiness and often justifiable bitterness will have on the child's well-being. Not only are the mother's concerns insufficiently understood, they are often labeled unfairly by lawyers and judges as selfish, irrational, crazy and obsessive. In each scenario the mother is the primary caregiver. She is the one who is typically required to choose between abandoning her child and abandoning her family, friends, career and culture in her home country. It is difficult not to feel great sympathy for her predicament, especially if she is the one who has been abandoned.

### **RESULTS OF DENIAL OF RELOCATION APPLICATION**

Denial of an application for relocation can have severe and devastating consequences. A typical downward spiral is as follows:

- The mother feels that she is imprisoned in this country.
- The mother considers abducting the child.
- The father increasingly fears that the mother will abduct the child.
- Each parent tries to increase his or her control over the child.
- The mother takes steps to take the child to her home country.
- The father makes an emergency application to court to prevent abduction.
- The court issues an order preventing the mother from leaving the jurisdiction.
- The relationship between the parents is completely destroyed, to the substantial detriment of the child.

The consequences may then include: parental alienation; criminal child abduction; Hague Convention litigation; enormous expenditures on legal fees; parental inability to agree on anything; and increasing police and judicial intervention, all of which cause awful consequential damage to innocent children.

### **A PLEA FOR UNDERSTANDING**

There is no quick and easy solution to these problems. However, a starting point is to understand better the plight of the expatriate spouse. In my experience, clients who wish to return to their country of origin in situations such as these often find that their lawyers and, therefore, the courts, do not adequately appreciate the extent of their plight and the merit of their cases. Many such spouses complain with justification that they are treated as difficult, uncaring or crazy, even by those who are supposed to be helping them. It is essential to understand what it is that these people are going through and to appreciate -- and communicate effectively to the court -- that their responses are the natural and

typical consequences of the situations in which they have been placed.

Such understanding exists in the business world, where it is commonly accepted that spouse/partner dissatisfaction and other family concerns are the most significant cause of "expatriate assignment failure" -- defined as "the inability of an expatriate to perform effectively in a foreign country and, hence, the need for the employee to be fired or recalled home. See, e.g., Relocation Trends Surveys, a wide-scale, yearly report issued since 1993. International companies now devote substantial resources to what I have termed the "plight of the expatriate spouse." The legal system should encourage similar understanding.

### **A POSSIBLE SOLUTION**

In many of the cases with which I have dealt -- representing mothers and fathers, both expats and local natives -- it would have been far better if the parties had agreed -- or if the judges had ordered -- a fair, appropriate and enforceable compromise solution.

If the other country has a developed and effective legal system, child custody laws that reflect a similar philosophy to ours, and strong laws to prevent international child abduction, an appropriate solution might include the following terms:

- Authorizing W to relocate with C once specific conditions have been fulfilled;
  - Requiring extremely generous visitation of C with H;
  - Requiring daily Internet contact, with webcams, between H and C;
  - Providing for joint decision-making between H and W as to all important matters affecting C;
  - Requiring W to obtain an order from the court in her home country that mirrors the terms of the order in H's jurisdiction, that acknowledges that the court in H's jurisdiction has continuing exclusive jurisdiction concerning all matters as to C's custody and visitation, and requiring the appropriate authorities in W's home country to enforce such orders; and
  - Imposing a significant penalty on W if she fails to comply with the order, including a severe financial penalty. This might take the form of a substantial bond or a reduction or suspension of financial support. Or a substantial portion of the assets being divided upon divorce might be held in escrow.
- Such a solution is far from perfect, but it would often be far better than the present policy in many courts of routinely denying most international relocation applications even in compelling cases.

### **EXPERT TESTIMONY ESSENTIAL**

Expert testimony as to the laws and practices of the foreign country concerning international child custody is generally absolutely essential in such cases.

*Jeremy D. Morley handles international child custody cases globally, always acting with local counsel as appropriate. He also frequently appears as an expert witness in courts in the United States, Canada and Australia on international child custody matters. He has provided expert evidence as to the international child custody law and practice of many countries, including Brazil, Bulgaria, China, Colombia, Czech Republic, Egypt, England, France, Germany, India, Indonesia, Italy, Japan, Jordan, Kuwait, Lebanon, Malaysia, Mexico, Morocco, Pakistan, Poland, Qatar, Russia, Saudi Arabia, Syria, Singapore, Taiwan, Turkey, Venezuela & UAE.*

## Notes on Kuwait, Child Custody and Child Abduction

By Jeremy D. Morley

1. Family and personal status law in Kuwait is governed by religious courts. In Kuwait the Sunni and Shi'a have their own court chambers to handle such matters in accordance with their own jurisprudence. In the case of Sunni Muslims, the Sunni chamber of the Family Court in Kuwait will apply the Maliki or the Hanbali interpretation of Islamic law. The Kuwaiti legal system is based on Islam and is codified into an "Islamicized" code as to marriage, divorce and child custody.

2. The governing laws that apply in child custody cases in Kuwait are the Kuwaiti Constitution and the Kuwaiti Personal Status Law. [Article 2 of the Constitution is entitled "State Religion"](#) and it provides that "The religion of the State is Islam, and the Islamic Sharia shall be a main source of legislation." Such laws are all based on concepts of gender appropriateness, age appropriateness and personal "morality."

3. Pursuant to the Personal Status Law of Kuwait, the Father is generally the legal guardian of the child, while the mother usually has physical custody of children up to a certain age. Article 209 of the statute states that the person with the most right to guardianship of a minor is the father, followed if he is unfit by the father's father and the male relations in the order of inheritance.

4. Article 192 of the Personal Status Law provides that, "The non-Muslim *hadina* [person who has residential custody] of a Muslim child shall be entitled to its custody until it starts to understand about religion, or until it is feared that it may become familiar with a faith other than Islam, even if it does not understand about religion. In all cases, such a child shall not remain with such a *hadina* after it has reached five [now 7] years of age."

5. Pursuant to Article 190 of the Personal Status Law a mother's claims of custody over her children will be barred if she is shown to lack the necessary fitness and moral character, considered in accordance with Islamic principles of submission to her husband and her personal sexual and other conduct, such as whether she lives with a non-Muslim or has or has had a relationship outside marriage with a man.

6. The U.S. State Department Human Rights Country Report on Kuwait states that, "In the event of a divorce, the law grants the father custody of children of non-Muslim women who fail to convert."

7. In Kuwait, foreign custody orders are merely items to consider as part of an overall de novo custody review. Custody orders and judgments of foreign courts are not enforceable in Kuwait if they potentially contradict or violate local laws and practices

8. If a woman obtains custody in Kuwait it will merely be what is often described as "captive custody," meaning that she will be prohibited from traveling with the child out of Kuwait without her ex-husband's or the court's permission. An integral component of guardianship in Sharia law is that the child must reside in the same location as the guardian even if another person has residential custody. Article 195 of the Personal Status Law specifically provides that the *hadina* (custodian as to residency) may not remove the child from the area of the guardian's residency without his express permission.

9. Travel bans may be imposed by the Kuwaiti government or by private citizens against Kuwaitis and non-Kuwaitis, including U.S. citizens, if there are claims concerning matters such as unresolved financial disputes. Such bans prevent the individual from leaving Kuwait for any reason pending resolution of the dispute.

10. Kuwait has not acceded to the Hague Convention on the Civil Aspects of International Child Abduction. The Convention is the fundamental international treaty that protects the rights of abducted children and serves to have them returned promptly to the country of their habitual residence. Kuwait has chosen not to adopt the treaty, even though it has been adopted by 95 other countries, including Islamic countries such as Morocco, Turkey and Turkmenistan.

11. There can be no extradition from Kuwait for international child abduction, since there is no extradition treaty between the U.S. and Kuwait.

## Notes on International Child Abduction and the Philippines

By Jeremy D. Morley

1. Although the Philippines has acceded to the Hague Abduction Convention, the Convention is not in force between the United States and the Philippines because the United States has not accepted the Philippines' accession. Articles 38 and 39 of the Convention provide that the treaty will not enter into force between an existing Contracting State and a newly acceding State unless and until the existing state expressly accepts the accession of the new state.

2. When a country accedes to the Convention, the U.S. State Department reviews the new signatory's domestic legal and administrative systems to determine whether the necessary legal and institutional mechanisms are in place for it to implement the Convention and to provide effective legal relief under it. If it determines that a country has the capability and capacity to be an effective treaty partner, the State Department declares its acceptance of the accession by depositing a written instrument with the Hague Permanent Bureau. Only then does the Convention enter into force between the United States and the acceding country. The State Department posts these details on its website and the Permanent Bureau maintains a current status list on its website.

3. Currently, the United States has not accepted the Philippines as a treaty partner. As a result, the Convention cannot be invoked in the case of abductions of children from the United States to the Philippines, or from the Philippines to the United States.

4. There are no bilateral arrangements between the United States and the Philippines concerning the return of abducted children.

5. In July 2016 the State Department issued its Annual Report on International Parental Child Abduction for the year 2015. The State Department reported that, "During 2015, the Philippines did not adhere to protocols with respect to international parental child abduction." It also reported that, "During 2015, the Department had 23 reported abductions to the Philippines relating to children whose habitual residence is the United States. Of those, seven were newly reported during the calendar year. By December 31, 2015, no cases had been resolved, as defined by the Act, and five reported abductions had been closed. By December 31, 2015, 18 reported abductions remained open."

6. There can be no extradition from the Philippines for international child abduction from the United States, since there is no extradition treaty between the U.S. and the Philippines.

7. Courts in the Philippines are not required to enforce foreign custody orders. There is no system in the Philippines of registration of foreign custody orders or enforcement of foreign custody orders. The Philippine courts will also take into consideration child custody decrees issued by foreign courts but there is no obligation that requires them to do anything more than "consider" such decrees.

8. The courts in the Philippines have jurisdiction under the law of the Philippines to deal with all matters concerning the custody of children who are in the territory of the Philippines, regardless of the continuing jurisdiction of a foreign court.

9. Article 213 of the Family Code of the Philippines provides that, “In case of separation of the parents, parental authority shall be exercised by the parent designated by the Court. The Court shall take into account all relevant considerations, especially the choice of the child over seven years of age, unless the parent chosen is unfit. No child under seven years of age shall be separated from the mother, unless the court finds compelling reasons to order otherwise.” Article 213 takes its bearing from Article 363 of the Civil Code, which reads:

“Art. 363. In all questions on the care, custody, education and property of children, the latter's welfare shall be paramount. No mother shall be separated from her child under seven years of age, unless the court finds compelling reasons for such measure.”

While the rule mandating sole custody of a child to a mother (except in exceptional cases) ends when the child is seven, the strong bias in favor of the mother continues after that age.

10. The courts in the Philippines are extremely backlogged and are subject to extreme delays.

11. Once a custody case is commenced in the Philippines, a travel hold concerning the Child will normally be in place in that country. The Philippines Government advises that, “A minor who is the subject of ongoing custody battle between parents will not be issued a travel clearance unless a Court Order is issued to allow the child to travel abroad with either one of his/her parents or authorized guardian. The family shall be responsible to notify the Bureau of Immigration to include the name of the child/ren in the watchlist of minors travelling abroad. It is therefore the Bureau of Immigration's responsibility to ensure that no child under the watchlist order leaves the country.”

## Thoughts on India's Repudiation of the Hague Abduction Convention

By Jeremy D. Morley

When I was in India in early September there was great hope among the legal community that India would move forward to join the community of nations in acceding to the Hague Convention on the Civil Aspects of International Child Abduction. Those hopes were dashed by the recent announcement by India's Women and Child Development Ministry that, "We are very clear that we are not signing the Hague Convention." India's status as one of the world's most significant havens for international child abduction will apparently continue unabated.

In 2009 the Law Commission of India issued a report entitled, "Need to Accede to the Hague Convention on the Civil Aspects of International Child Abduction." At the time, the recommendation that India should sign the Convention seemed to fall on deaf ears. Meanwhile foreign criticism of India for not returning internationally abducted children grew, especially from the United States and the U.K. Indeed, the U.S. State Department determined that India "demonstrated a pattern of noncompliance by persistently failing to work with the United States to resolve abduction cases." As a result, the U.S. Government issued a formal diplomatic protest--a demarche--to India in May 2015 (and again in July 2016).

A sign of progress occurred in February 2016 when the High Court of Punjab and Haryana formally asked the Law Commission of India to examine whether to issue a recommendation "for enacting a suitable law for signing the Hague Convention." The Government of India then published a draft of a proposed "Civil Aspects of International Child Abduction Bill 2016," and in July it placed the Bill on the website of the Women and Child Development Ministry. In October the Law Commission issued a new report in which it recommended that India sign the Convention and that certain amendments to the proposed bill should be enacted.

And then everything ground to an apparent halt. The Minister of Women and Child Development stated that acceding to the Convention would not be in the interest of aggrieved women "who have been abandoned by their husbands abroad, had their passports snatched from them, been beaten up, and have somehow scraped the money and are in terrible fear, I wonder whether we should join or not." Furthermore, she said that there are fewer instances of Indian children being abducted and taken abroad than of children being abducted to India. The Indian press is reporting that the proposed bill is likely to be "junked."

This decision, if maintained, will put Indian nationals and persons of Indian origin living outside India at a tremendous disadvantage. Courts in the United States will likely not permit them to take children for family visits to India if the other parent objects because the Indian legal system can certainly not be counted on to return the children if they are retained in India. It means that winning international relocation cases to India will likely be far more difficult than is the case currently. And it means that desperate India mothers (and men) who take their children to India over the objections of the other parent will be committing a serious felony under U.S. law and will likely be unable to leave India because of fear that they will be arrested once an Interpol notice is circulated.

It is to be hoped that the Indian Government reconsiders what appears to be a most short-sighted decision.

## Child Visits to Israel

By Jeremy D. Morley\*

When parents are separated and one wants to take a child to visit Israel, the other parent often worries that the child will not be returned, especially if the taking parent is Israeli or has expressed a desire to live in Israel. Such concerns should not be brushed aside. Obviously, if the taking parent is, for example, a homesick expat Israeli or a Jew who yearns to make *aliyah* to Israel or a person whose own parents live in Israel, the concerns of many left-behind parents will normally be greatly enhanced.

Both Israel and the United States are parties to the Hague Convention on the Civil Aspects of International Child Abduction. This treaty requires that children who are wrongfully retained away from the country of their habitual residence must normally be promptly returned to that country. Israel Indeed, any lawyer handling international child custody cases will be well aware that many of the major U.S. decided cases on the Hague Convention are cases with a significant Israeli connection.

However, the Convention does not work automatically and children are often not returned. The left-behind parent must establish certain matters before the court in the foreign country and the taking parent may rely on any of the six exceptions (sometimes described as defenses) to the Convention. Hague cases are invariably stressful to both parents, and they can be extremely expensive.

Furthermore, some parents may take advantage of some of the unique features of the Israeli legal system once they have successfully taken a child into Israel. In particular, they may obtain a “stop” order that will prevent a child from being taken out of the country. Such orders are routinely issued and they incentivize a parent who wants the child to remain in Israel – either because of a belief that it would be better for the child to live there or in order to create leverage over the other parent in financial or child custody negotiations - to delay the custody case for as long as possible.

If the taking parent commences a custody case in an Israeli Family Court, such an order may even be issued *ex parte* (without notice to the other party) and transmitted immediately to the border police at all airports and border crossings. Or if the taking parent commences a divorce case in a religious court in Israel, a stop order may be issued by that court.

It can be difficult, expensive and nerve-wracking to try to overturn a stop order. It often provides powerful leverage to the taking parent who might be using such tactics with the left-behind parent.

We often work with parents in the United States who want to prevent their children from being taken to Israel because of such concerns or who want to create the strongest possible documentation and court orders that will authorize visits on terms that will drastically minimize the risk. There are various steps that can and should be taken to substantially reduce the risks.

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The below article was published in the May 2016 issue of *AJ Famille*, a monthly publication featuring articles on all aspects of Family Law, with a French focus:

### **The Hague Abduction Convention in the United States**

By Jeremy D. Morley\*

The Hague Convention on the Civil Aspects of International Child Abduction is a remarkably successful international treaty that has had a substantial impact globally in deterring international child abduction.

The purpose of this article is to inform lawyers in France of some of the distinct ways in which the Convention operates in the United States.

#### **Limited Role of Central Authority**

The State Department's Office of Children's Issues is the U.S. Central Authority for Hague cases. Unlike many other countries, the U.S. Central Authority does not litigate Hague cases, and is not involved in any significant way in Hague litigation. A petitioning parent must retain private counsel to initiate a Hague case in court in the U.S.

Submitting an application to the Office does not initiate judicial proceedings, does not stop the clock for purposes of the "one year and settled" exception to the Convention, and does not require the taking parent to take or not to take any action. The Office does not appoint attorneys for left-behind parents and does not file return petitions with the courts. The responsibility for starting a Hague case in an appropriate court rests exclusively with the left-behind parent.

One area in which the Central Authority has an important role is that it is required by Congress to prepare regular reports as to the compliance by other Hague countries with the provisions of the Convention. These reports are useful evidence in custody cases concerning whether or not a parent should be allowed to take a child for a visit to a foreign country.

#### **Treaty Partners**

The United States has not accepted as Hague Convention treaty partners all countries that have acceded to the Convention. The status of such acceptances must be checked whenever a Hague case is contemplated.

#### **Concurrent Jurisdiction**

In many countries Hague cases are channeled to a limited number of judges who have special training and experience in handling Hague cases. While the U.S. State Department has lobbied other countries to provide such training and judicial concentration in Hague cases, in the U.S. Hague cases can be brought before either federal or state judges wherever the child is located. Since there are several thousand counties and many federal judicial districts, a Hague case can be brought before any one of thousands of courts in the U.S. Most such judges have never handled a Hague case."

Family Court judges and U.S. federal judges have completely different backgrounds. This means that the choice of the state or federal system can have a major impact on the outcome of the case. Litigants and counsel might prefer a family court judge who has experience in child custody cases or a federal judge who does not have any such experience.

In practice, the vast majority of Hague cases are brought in federal court. Petitioners often prefer to bring the case in a court that is not accustomed to applying "best interests" analyses in conventional

child custody cases. Also, swift action might be more likely in a federal court, whose dockets are shorter and whose enforcement procedures are clear and forceful.

If the case is started in a state court the respondent has the absolute right to remove it to the federal court.

### **Application and Petition**

The standard Hague application that is filed with the Central Authority need not contain much detail. The usual procedure is that the petitioner's attorneys will then file a far more detailed petition in the appropriate court, which may be supported by documentary evidence and even by sworn affidavits. Often an ex parte motion for a protective order is filed at the same time, seeking an immediate court order barring the respondent from leaving the jurisdiction with the child and requiring that passports be deposited in court. The respondent then has a limited period of time within which to file its responsive pleading, and must appear in court at a certain time (often within just a few days) typically with the child.

### **Live Hearings**

At the first court appearance, petitioner's attorney will normally explain the petitioner's theory of the case and ask the court to schedule a final hearing on the matter on as expeditious a basis as possible. The respondent's attorney will normally advise the court at this time of the basis of the defense.

Occasionally a court might decide the case summarily based on the papers submitted by the parties but usually the court will schedule a hearing with live witnesses. The hearing date should be well within the six week schedule called for by the treaty.

The court will also generally hear and resolve at this time any pre-hearing issues that either party might raise. Such issues may include the following: Whether pre-hearing discovery should be permitted and, if so, upon what terms; whether interim relief should be ordered, or continued if previously ordered; whether a guardian or lawyer should be appointed for the child; whether telephone or video testimony should be permitted; and whether witness affidavits should be accepted in evidence.

### **Discovery**

Pre-trial discovery is often permitted provided it does not delay the trial. The discovery can include pre-hearing depositions (out-of-court oral testimony of a witness that is reduced to writing for later use in court), written interrogatories, and demands for the production of documents and other evidence.

### **Guardian / Lawyers for Child**

If a respondent asserts an exception based either upon grave risk of harm to the child or on the objections of a mature child, the court might appoint an independent expert to help determine the facts or an independent lawyer to represent the child. Courts have sometimes appointed an attorney to act in the dual role of the "guardian ad litem" (a person the court appoints to investigate what solutions would be in the "best interests of a child") and as the child's attorney.

### **Child's Testimony**

The testimony of the child who is the subject of a Hague petition may be heard in a Hague case when appropriate. The child's opinions are frequently permitted on the issue of a mature child's objection. A child's testimony has also been permitted as to facts concerning whether the child was habitually

resident in a specific location and as to the grave risk exception. In such cases the courts make it quite clear that the weight they will give to such testimony may be less than that given to the testimony of other witnesses, depending on the age and maturity of the child and the extent to which the child's testimony is independent. A child's testimony is often taken in an informal manner.

### **Legal Fees**

The legal fees in a U.S. Hague case can be very high. U.S. domestic law expands Article 26 of the Convention by providing that any court that orders the return of a child under the Hague Convention "shall order" the respondent to pay "necessary expenses" incurred by or on behalf of the petitioner, "unless the respondent establishes that such order would be clearly inappropriate." However, there is no provision for a winning respondent to claim legal fees from the petitioner.

### **Habitual Residence**

It may surprise foreign lawyers to learn that the issue that creates the most confusion and lawyers' time in American courts is that of habitual residence. Determining the child's "habitual residence" is a threshold issue in any Hague Convention case. It is often outcome-determinative because, if the court concludes that the country from which the child was removed was not the country of the child's habitual residence, the Convention will not apply and the petition must be dismissed.

Courts in the U.S. have scrutinized the phrase extensively and there has been substantial diversity in the way that it has been interpreted in different circuits and by many state courts.

The courts have developed three primary but divergent approaches to determine the habitual residence.

The first approach – followed by a majority of courts -- focuses primarily on parental intention, with a subsidiary look at acclimatization. The parents' "last shared intent" regarding their child's habitual residence is presumed to be controlling, although the presumption can be rebutted in exceptional cases if the child has sufficiently acclimatized to its new surroundings as to render a return order unfair or seriously damaging.

Courts taking this approach will decide that a child has acquired a new habitual residence only if it is established that the parents had a shared and settled purpose to do so. Many courts also require proof of an intention to abandon the former habitual residence. The inquiry focuses on the state of mind of each of the parents, and whether their intent was shared. This may be revealed by considering, for example, whether or not they intended the move to be permanent or temporary, how long they intended to stay, whether they had plans to return to a previous residence, whether the shared intention was unconditional and whether an express or implied condition was satisfied. It is possible, using this approach, to find that a child remained habitually resident in a prior country of residence despite having resided for several years in a new country, even attending school and assimilating into the new community.

The second approach is the "child-centered approach" whereby the courts look exclusively at the child's objective circumstances and past experiences. Relevant inquiries include whether the child is attending school, the child's participation in other cultural, and the child's overall level of acclimatization and integration into the community. The inquiry does not consider parental intent, which is deemed to be entirely irrelevant.

The third approach requires a mixed inquiry into both the child's circumstances and the shared intentions of the child's parents. How much weight should be given to each factor is unclear. Sometimes

evidence of shared parental intent to abandon an old habitual residence and acquire a new one will trump any evidence of acclimatization from the child's perspective. In other cases, sufficient evidence of acclimatization will defeat any evidence of shared intent.

Unfortunately the U.S. Supreme Court has never resolved the conflicting interpretations. As a result, the treaty can be interpreted quite differently depending, for example, on whether the case is brought on one side or the other of the Hudson River between New York and New Jersey, with New York looking primarily at the last shared parental intention and New Jersey looking far more at the actual "conditions on the ground." The treaty is supposed to have one autonomous meaning on a global level, but that has rule not been respected in the U.S.

Since the majority interpretation focuses on parental intention, it is essential whenever habitual residence is disputed to present as much evidence as possible as to all the factors that might indicate such intention.

### **Grave Risk of Harm**

The U.S. follows the general principle that the grave risk of harm exception in Article 13(b) of the Convention must be interpreted narrowly. The burden of proof of most of the Hague exceptions is "preponderance of the evidence" but for grave risk it is "clear and convincing evidence," a much higher standard.

Expert testimony is often used by both sides, especially testimony from doctors, psychologists, social workers and even lawyers who can testify as to the resources available in the habitual residence. Such testimony may be decisive in proving or disproving grave risk of harm.

Many courts require a respondent to establish prior harm to a child but also to prove that the authorities in the habitual residence will not provide adequate protection if the child is returned. Some courts have recently deviated from that requirement and the issue is unsettled.

A difficult situation often arises when there is evidence of domestic violence against a spouse, but less severe abuse or none at all directed at the child. Traditionally, a respondent must show a strong link between the spousal abuse and harm to the child, but some courts have adopted a broader approach. The cases vary dramatically depending on the facts of the case and the nature and quality of the evidence.

### **Undertakings**

Some U.S. courts have attached conditions, or undertakings, to a return order in an effort to mitigate the risks that might result from the return. The U.S. Department of State has urged that undertakings should be used sparingly and be narrowly tailored to advance the Convention's goal of prompt return. In some cases the courts have stated that undertakings provide a false sense of security, since they may well be totally unenforceable.

### **An Alternative Procedure**

There is an alternative procedure in the U.S. to obtain the return of an abducted child.

Every American state) has adopted the Uniform Child Custody Jurisdiction & Enforcement Act (the "UCCJEA"), except Massachusetts which has a similar law.

The UCCJEA generally requires U.S. courts to register and enforce custody determinations issued by a foreign court if that court had jurisdiction under the jurisdictional principles contained in the UCCJEA. If

the child had lived in the foreign country for the six months preceding the commencement of the foreign custody case, and if that case was the first custody case concerning the child, the foreign country will be the “home state” of the child within the meaning of the UCCJEA, and an American court must normally consider that the foreign court had custody jurisdiction.

It may be preferable for a left-behind parent whose child has been taken to the U.S. to proceed under the UCCJEA instead of the Hague Convention. There are several reasons for this:

- The primary venue for the litigation is the jurisdiction from which the child was taken. This will usually be far more convenient and comfortable than a distant and unfamiliar American court.

- It is often far easier to establish that the foreign country is the “home state” for UCCJEA purposes than the habitual residence.

- Once a notice to register the foreign custody order is properly given in a U.S. court, it must be enforced unless the respondent can establish that (1) the issuing court had no jurisdiction; or (2) the foreign child custody determination was vacated, stayed, or modified by a court in the foreign country; or (3) notice or an opportunity to be heard was not given to the other parent.

- The UCCJEA does not permit the respondent to assert any of the exceptions that can be asserted in a Hague case.

- A case can be brought under the UCCJEA to register and enforce a foreign custody order even if the foreign country is not a party to the Hague Convention (unless its child custody laws violate human rights).

- The Hague Convention does not provide an effective mechanism for to enforce access rights. The UCCJEA has no such restriction.

- The Hague Convention applies only in respect of children under the age of 16.

- Hague cases generally raise “interesting” (i.e., expensive) issues. UCCJEA enforcement cases usually (but not always) do not. Therefore UCCJEA cases are generally substantially cheaper.

On the other hand, it could be better in some cases to bring suit under the Hague Convention, instead of under the UCCJEA, for a variety of reasons:

- The courts in the child’s habitual residence might not exercise custody jurisdiction if the child is no longer located there. From a U.S. perspective the courts of that country might have jurisdiction but if those courts do not have jurisdiction under their own jurisdictional rules and if there was no custody order in place prior to the child's removal, there will be no foreign custody order to register and enforce in the United States.

-If the foreign country was not the home state for purposes of the UCCJEA, because the child lived there for less than six months (unless he or she was a baby less than six months old), a custody order issued by a court in that country will generally not be enforceable under the UCCJEA.

-If proper notice or a proper opportunity to be heard was not provided by the foreign court, this will be fatal to an effort to register and enforce the order in the U.S.

-If the courts in the child's habitual residence act slowly it may well be far better to bring a Hague case forthwith in the place where the child is currently located.

-If the courts of the habitual residence will not handle the custody case' unless and until the child is returned there, it would be possible for the left-behind parent to wait until the U.S. court has custody jurisdiction, usually after six months, and then to sue for custody in the U.S. state where the child is located. In such a situation, however, a Hague case would invariably be a far wiser course, since it would be much quicker and it would not open the door to a full-blown best interests analysis.

## **Conclusion**

Hague cases are handled differently in the U.S. than in other countries. The Convention generally works well but it requires strategic implementation and expeditious implementation. In some cases it is better to proceed under the UCCJEA.

\*Jeremy D. Morley is a New York lawyer who handles Hague Convention throughout the United States. He is the author of the American Bar Association book, *The Hague Abduction Convention: Practical Issues and Procedures for Family Lawyers*. He may be reached at [jmorley@international-divorce.com](mailto:jmorley@international-divorce.com)



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**Representation in Family Court Proceedings**

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**Topic Five**

**Ethics**



# ETHICAL CONSIDERATIONS ON THE APPOINTMENT OF GUARDIAN AD LITEMS IN FAMILY COURT

ADELE M. FINE, ESQ., PRESENTER

NYSBA CLE: Representation in Family Court Proceedings  
June 9, 2017  
Albany, NY

- I. The issue of appointment of a GAL presents difficult ethical issues for the attorney**
- A. What are the circumstances under which you should ask for a GAL, or oppose the appointment of a GAL by the court or another party?
  - B. Will you prejudice your client's case by asking for a GAL?
  - C. Will a GAL make your representation more difficult or more effective?
  - D. What decisions, if any, can the GAL make, and what decisions exceed the scope of the GAL appointment?

**II. Authority for assignment of GAL in Family Court**

CPLR § 1201 - Representation of infant, incompetent person, or conservatee

A person shall appear by his guardian ad litem ... if he is an infant, person judicially declared to be incompetent, ... or *if he is an adult incapable of adequately prosecuting or defending his rights.* (emphasis added)

**III. Rule 1.14 of the NY Rules of Professional Conduct: Client with Diminished Capacity**

- A. 1.14(a) – the cardinal rule is that even if the lawyer believes the client has “diminished capacity” due to a mental impairment, the attorney **shall**, as far as reasonably possible, maintain a “conventional” relationship with the client
  - 1. A conventional attorney-client relationship assumes that the client, when

properly informed and advised by the lawyer, is able to make decisions about important matters.

2. Clients with diminished capacity will often have the ability to understand and make decisions about legal matters affecting the client's own life
  3. When the client's mental or physical condition makes a client incapable of communicating with the lawyer or of making a considered judgment on their own behalf, then the lawyer needs to consider whether "protective action" is necessary
- B. 1.14(b) – if the lawyer believes the client with "diminished capacity" is a) at risk of substantial physical, financial or other harm, and b) cannot communicate or make reasonably considered decisions the lawyer may take "protective action"
1. Such action may take the form of talking to family members, waiting to see if things improve, consulting with support groups, treatment providers, adult protective agencies, etc., or others who have the power to protect the client
  2. Lawyer should be guided by the client's goals to the extent known, the client's best interests, and by minimizing the attorney's intrusion into the client's decision making autonomy
  3. Appointment of a guardian should be a last resort, e.g., that there is no other practical means to protect the client's interests. The least restrictive must always be sought
- C. 1.14(c) – the lawyer is impliedly authorized to reveal information about the client when seeking protective action, but only to the extent necessary to protect the client's interests
1. Information related to a client's diminished capacity is protected as confidential by Rule 1.6 of the Rules, and its disclosure will almost always adversely affect the client.
  2. If the lawyer believes protective action is necessary, then disclosures may be made to the extent necessary, even if the client directs the lawyer to the contrary
  3. At a minimum, before disclosing adverse information about the client, the lawyer should determine whether the "person or entity consulted will act adversely" to the client's interests
  4. The lawyer must take proper protective action before seeking to withdraw from representation, even though the lawyer might think that Rule

1.16(c)(4) or (7) might permit withdrawal

**IV. Standard F-11 of the ILS Standards for Parental Representation in State Intervention Matters – Client Capacity**

- A. “Maintain a normal lawyer-client relationship with a client who has limited capacity, to the extent possible.”
- B. The commentary to this standard echoes many aspects of Rule 1.14 of makes the following points pertaining to capacity in the context of Article 10 and termination of parental rights cases:
  - 1. Respect the client! A client’s mental health diagnosis or cognitive condition does not necessarily preclude the client from participating in the representation or from parenting successfully and safely
  - 2. If the attorney suspects that capacity may be an issue, investigate the situation, e.g., consult with experts and/or review the client’s prior treatment records, to determine how the client’s condition may affect the client’s ability to work with the attorney or parent a child
  - 3. Do a proper assessment if diminished capacity is suspected, and seek assistance from other sources before even considering a request for a GAL. The standard contemplates that a GAL will be requested by the parent’s attorney only in the rarest of circumstances, if at all.
  - 4. Recognize the danger of the presence of a GAL in a state intervention case – it signals to the court that the “client’s disability is severe and severely undermines the client’s position in the litigation with respect to preserving his/her parental rights.”
  - 5. Withdrawing as the attorney is the coward’s way out – it leaves the client without an attorney at a time when the client needs one the most

**V. Ethics opinions – NYSBA Committee on Professional Ethics Opinion 986 (10/25/13)**

- A. Although the opinion does not address the situations that parents’ attorneys typically find themselves in, it does provide some guidance on how the lawyer should proceed when faced with a client with “significant diminished capacity”
  - 1. Main points:
    - a. If assigned counsel believes they may need to take protective action, before deciding what to do, must “carefully evaluate” each

situation based on all the facts and circumstances

- b. The appointment of a guardian is a “last resort” when no other course of action will protect the client’s interests
- c. Opinion gives examples of what it means to exhaust all other options
  - i. The attorney has regularly communicated with the client as a lawyer does in a “normal” attorney-client relationship
  - ii. The attorney knows the client’s stated goals
  - iii. The attorney has a “reasoned basis” beyond the client’s ill considered judgments to conclude the client cannot act in his own best interests, e.g., unable to communicate with client, sought input and guidance from family, sought a medical evaluation
  - iv. Lawyer sought advice from other people, community resources or social services agencies, and determined no referral to such entities would protect the client
  - v. Acknowledges that Rule 1.14 “is often frustrating” because it does not provide solutions to all problems in representing clients with diminished capacity. But it does provide “an intelligible frame of reference for the lawyer and those who might later judge his conduct.” [citation omitted]

## **VI. What is Diminished Capacity?**

### **A. What is capacity?**

- 1. Capacity refers to the client’s ability to engage in a decision-making process during the course of legal proceeding, and to communicate decisions to lawyer
- 2. Lawyer should presume capacity
- 3. Not a thing, but a “shifting network of values and circumstances”
- 4. Decision-making capacity requires, “to greater or lesser degree: (1) possession of a set of values and goals; (2) the ability to communicate and to understand information; and (3) the ability to reason and to

deliberate about one's choices." See Sabatino, Charles P., "Assessing Clients with Diminished Capacity", *Bifocal*, Vol. 22, No. 4, Summer 2001, ABA Commission on Legal Problems of the Elderly

5. Determined in context – client's intelligence, experience, age, education, mental and physical condition, emotional state, the nature and complexity of the proceeding
  6. Decision-making capacity factors as set forth in Comment 6 to Rule 1.14 of the ABA Model Rules of Professional Conduct are explained as follows:
    - a. The client's ability to articulate reasoning behind a decision
    - b. The variability of the client's state of mind
    - c. The client's ability to appreciate consequences of a decision
    - d. The consistency of the decision with the client's known long-term commitments and values
- B. How is the lawyer to determine when the client's capacity is diminished to the point that protective action should be taken?
1. Diminished capacity is not defined in Rule 1.14
  2. Diminished capacity is not the same thing as a judicial determination of "incapacity" or "incompetence" – diminished capacity may be determined without any judicial determination of any kind. *1234 Broadway LLC v Feng Chai Lin*, 25 Misc 3d 476 [Civ Ct, Bronx County 2009]
  3. Lawyer's responsibilities:
    - a. To know the difference between "capacity" and foolish behavior or aberrant character traits – clients with mental health issues are allowed to be squirrely, obstinate risk-takers
    - b. Know the client's values, behavior standards and goals – to guard against substituting lawyer's values for those of the client
    - c. Do a proactive assessment of the client's decision-making capacity
      - i. Is the client able to communicate her opinions, concerns, desires, etc.
      - ii. Is the client able to understand others' communications

to him/her, particularly yours as the attorney?

- iii. Is the client able to reason and to communicate their reasoning behind whatever decision is at issue?

C. New York case law relevant to parent representation in state intervention cases most often defines diminished capacity in terms of what it is NOT:

1. No diminished capacity if the client was a) capable of understanding the proceedings, b) defending her rights, and c) assisting counsel

*Matter of Marie ZZ. (Jeanne A.)*, 140 AD3d 1216 (3rd Dept 2016)(mental illness TPR)

*Matter of Barbara Anne B. v Lori Lynn F.*, 51 AD3d 1018 (2nd Dept 2008)(mental retardation TPR)

*Matter of Justice T.*, 19 AD3d 1079 (4th Dept. 2005)(mental illness TPR)

*Matter of Philip R.*, 293 AD2d 547 (2nd Dept. 2002)(mental illness TPR)

*Matter of Leala T.*, 55 AD2d 1007 (3d Dept. 2008)(abandonment TPR)

*Matter of Stephen UU*, 81 AD3d 1127 (3d Dept.2011)(abandonment TPR)

*Matter of Shawndalaya*, 31 AD3d 823 (3d Dept. 2006)(neglect)

*Matter of Julie G. v Yu-jen G.*, 81 AD3d 1079 (3d Dept. 2011)(family offense)

2. See also *Mil'Chamot v NY City Hous. Auth.*, 2016 US Dist LEXIS 176883 (SDNY Dec. 20, 2016)

In civil litigation matter, Court held a hearing to determine the plaintiff's competence to enter into a settlement agreement. Factors favoring diminished capacity were that the plaintiff was homeless, had no family, he was formerly addicted to heroin but was now on methadone, had previously been diagnosed with bi-polar disorder, made statements indicating he harbored some "bizarre thoughts", including one where he believed that during an emergency room visit the government had implanted a "verichip" in his body to track his movements, and he had once before been found incompetent to stand trial in a criminal matter

Factors favoring the plaintiff's competence (which the Court ultimately found) were that the plaintiff was able to answer the judge's questions appropriately, including the current date and the names of the main presidential candidates, he goes to a gym, he could describe his education

and employment history, he was able to articulate why he did not want a GAL appointed for him, he was well groomed, appeared clean and was oriented as to space and time, he understood the nature of the proceedings, and he understood the negative consequences of a ruling against him.

- D. New York case law suggests it is a losing proposition to argue on appeal that a GAL should have been appointed for the parent due to the parent's alleged diminished capacity, if that is one of the main arguments for reversal of the lower court's decision – the record speaks for itself in terms of the client's capacity
- E. Where a GAL is appointed, it is usually apparent to the Court independent of the attorney or any other party that the client has diminished capacity such that the appointment of a GAL is appropriate

*Anonymous v. Anonymous*, 256 A.D.2d 90, 91, 681 N.Y.S.2d 494, 494 (1st Dep't 1998) (trial court's appointment of a guardian ad litem approved based on "the court's observation of defendant in an apparently chronic irrational and agitated state attributable to alcohol and substance abuse and defendant's consequent and manifest inability to assist his attorneys in his defense . . . .")

*Douglas Elliman LLC v. Silver*, 49 Misc. 3d 1211[A] (Sup. Ct. Suffolk Co. 2015) (appointment of a guardian ad litem may be required "[i]f [defendant] has deteriorated into a 'chronic irrational and agitated state' demonstrating a 'manifest inability to assist' her attorneys in her defense")

- 1. But again, the client's condition may improve during the course of the litigation such that a GAL is no longer necessary. The attorney should always be reassessing the situation and if the attorney determines the client's diminished capacity does not interfere with the client's ability to make decisions on his/her own behalf or work with the lawyer, then the attorney should ask that the GAL be discharged.

## VII. Protective Action

- A. Nature of duty to take protective action is in lawyer's sound discretion
- B. Lawyer's protective action assessment
  - 1. Client's capacity so impaired that client risks substantial physical, financial or other harm
    - a. Risk of physical harm to self and children – domestic violence
    - b. Risk of financial harm – child support issues

- c. “Other harm” is the one most parent attorneys deal with – risk of loss of right to care for children (losing custody, visitation, parental rights)
  - 2. Client not able to reason, communicate, make decisions about case, testify at trial, or otherwise protect their own interests
- C. Comment 5 to 1.14(b) suggests protective measures that could be undertaken privately by attorney without risk of disclosing adverse client info
  - 1. Meet with the client more than once and in different settings
  - 2. First interview of client should include you and client only
  - 3. Investigate history of mental health diagnoses and treatment (including medications)
  - 4. Assess possible impact of substance abuse
  - 5. Obtain client’s consent to talk to prior or current mental health providers
  - 6. Discuss with client possibility of doing a mental health eval
  - 7. With client consent, talk to family members and others who are close to the client
  - 8. Have some familiarity with mental health conditions
  - 9. Seek advice from other organizations, and make referrals for client as appropriate
  - 10. Let time pass and see if situation improves, engage in regular reassessment

## VIII. Guardian ad Litem as a Form of Protective Action

- A. GAL mean literally guardian “for the suit” – temporary status that ends upon conclusion of particular legal proceeding. The appointment of a GAL in Family Court is a much more informal process than the appointment of a guardian under Article 81, or a conservator in Surrogate’s Court. *Mil’Chamot v NY City Hous. Auth.*, 2016 US Dist LEXIS 176883 (SDNY Dec. 20, 2016)
- B. A GAL may be appointed at any time during the litigation. *Rapoport v Cambridge Dev., LLC*, 51 AD3d 530 (1st Dept 2008)

C. No default may be taken against a person who has a known mental impairment and may be entitled to GAL

1. This may be a saving grace on appeal from the denial of a motion to vacate a default, when the record shows the child welfare agency knew that the respondent parent was mentally ill or otherwise had diminished capacity and did not bring this fact to the attention of the Court prior to entry of the default order.
2. The argument is that the order should be vacated and a hearing held to determine whether the parent's capacity was diminished such that a new hearing was in order

*Fischer v. Fischer*, 21 AD3d 554 (2nd Dept. 2005) (child support)

*Brewster v. John Hancock Mut. Life Ins. Co.*, 280 AD2d 300 (1st Dept 2001)

*Shad v Shad*, 167 AD2d 532 (2nd Dept 1990)

*State v Kama*, 267 AD2d 224 (2nd Dept 1999)

*Sarfaty v.Sarfaty*, 83 AD2d 748 (4th Dept. 1981) (divorce action)

*Oneida Nat'l Bank & Trust Co. v Unczur*, 37 AD2d 480 (4th Dept 1971)

*Rakiecki v. Ferenc*, 21 AD2d 741 (4th Dept. 1964)

D. If a child welfare agency or AFC seeks to have a GAL appointed for your client against your and your client's wishes, request a hearing and make the other party prove that the appointment of a GAL is necessary

## **IX. What is Guardian Ad Litem's Role and Authority?**

- A. The GAL's role in Family Court is problematic by its nature – appointment is by an informal procedure, the GAL receives no pay for any of the work undertaken, the GAL's role may be unclear particularly when the GAL is an attorney
- B. But while the standard maxim is that the GAL “stands in the shoes” of his or her ward to assist attorney with litigation, and may be the guardian of the ward's procedural due process rights, the following is also true:

The GAL is not the ward's "mouthpiece"  
The GAL may be a "friend of the court"  
The GAL is acting in a non-legal capacity  
The GAL does not necessarily have a confidential relationship w/ ward  
The GAL may be required to testify against ward's interests  
The GAL may act in ward's "best interests" even against ward's wishes

1. *See also* NC 2004 Formal Ethics Opinion 11 (Lawyer Appointed as Guardian Ad Litem for Indigent Respondent in TPR Proceeding) – an attorney GAL is not acting in an attorney-client relationship with the parent, although it would be prudent for the attorney to explain that his or her role is NOT to serve as a second attorney
  2. If a GAL is appointed against the client's and your wishes as attorney, you as the client's attorney have the authority to counsel your client not to cooperate with the GAL
- C. No cases found either authorizing or rejecting a GAL's authority to consent to a particular outcome in a state intervention case, e.g., consenting to a settlement of an Article 10 abuse or neglect case, or executing a judicial surrender of parental rights in a TPR case
- D. It appears that GALs are not entitled to resolve the ultimate issues of a case particularly in the absence of the client's consent and where a monetary settlement is at issue

*Tudorov v. Collazo*, 215 AD2d 750 (2d Dept. 1995)(GAL had no authority to settle ward's personal injury claim, only a guardian appointed pursuant to Article 31 has such authority; matter remitted to determine whether Article 81 guardian should be appointed)

*Sills v. Fleet Nat'l Bank*, 32 AD3d 1157 (4<sup>th</sup> Dept. 2006)("well settled" that a GAL is not authorized to approve a proposed settlement and discontinue ward's actions)

*Kushner v Mollin*, 144 AD2d 649 (2nd Dept 1988)(court erred in not holding hearing to determine whether mentally retarded plaintiff in dental malpractice case needed a guardian ad litem prior to accepting a settlement based solely upon plaintiff's mother's consent)

*1234 Broadway LLC v. Feng Chai Lin*, 25 Misc3d 476, *supra* (GAL had no authority to settle ward's landlord-tenant dispute against ward's wishes)

- E. But there is case law, including Family Court case law, where a GAL's recommendation of a settlement that the GAL believed was in the client's best interests and protected the client's rights, was held to be proper.

*E. 10th St. LLC v Garcia*, 37 Misc 3d 1224[A], (Civ Ct, Bronx County 2012)(the GAL acted properly in recommending a particular settlement to the Court that the GAL thought was in the client's best interests. GAL had no authority to unilaterally bind the GAL, and the ultimate determination to accept the GAL's recommendation rested with the Court)

*Feliciano v. Nielsen*, 290 AD2d 834 (3d Dept. 2002)(GAL acted within authority in engaging in settlement discussions with respondent parent's attorney and recommending a custody stipulation that permitted father to relocate out of state with children)

*Lau v. Berman*, 6 Misc.3d 934 (Civ.Ct City of NY, 2004)(GAL acted properly in submitting report to court that was against ward's wishes)

**X. Major points:**

- A. Parent's counsel should rarely, if ever, request a guardian ad litem
- B. An attorney ethically must do as much "behind the scenes" work to protect the client without resorting to a request to assign a GAL
- C. Request a hearing if there is a dispute as to whether your client requires a GAL
- D. While GALs may be appointed at any point in the litigation, they may also be discharged at any point in the litigation
- E. A GAL may have authority to recommend a particular disposition, but probably does not have authority to consent to major litigation outcomes that adversely affect the client's parental rights

## **RULE 1.14:**

### **CLIENT WITH DIMINISHED CAPACITY**

**(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.**

**(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.**

**(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.**

#### **Comment**

[1] The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. The conventional client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. Any condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities upon the lawyer. When the client is a minor or suffers from a diminished mental capacity, maintaining the conventional client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon and reach conclusions about matters affecting the client's own well-being.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client attentively and with respect.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. The lawyer should consider whether the presence of such persons will affect the attorney-client privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, with or without a disability, the question whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and reasonably believes that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

### **Taking Protective Action**

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a conventional client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take reasonably necessary protective measures. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making

tools such as durable powers of attorney, or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interest, and the goals of minimizing intrusion into the client's decision-making autonomy and maximizing respect for the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: (i) the client's ability to articulate reasoning leading to a decision, (ii) variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision, and (iii) the consistency of a decision with the known longterm commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that a minor or a person with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be unnecessarily expensive or traumatic for the client. Seeking a guardian or conservator without the client's consent (including doing so over the client's objection) is appropriate only in the limited circumstances where a client's diminished capacity is such that the lawyer reasonably believes that no other practical method of protecting the client's interests

is readily available. The lawyer should always consider less restrictive protective actions before seeking the appointment of a guardian or conservator. The lawyer should act as petitioner in such a proceeding only when no other person is available to do so.

[7A] Prior to withdrawing from the representation of a client whose capacity is in question, the lawyer should consider taking reasonable protective action. See Rule 1.16(e).

### **Disclosure of the Client's Condition**

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client.

## **NYS Indigent Legal Service Standards - Parental Representation in State Intervention Matters (2015)**

**F-11. Client capacity.** Maintain a normal lawyer-client relationship with a client who has limited capacity, to the extent possible.

### **Commentary**

A client's mental health diagnosis or cognitive condition does not necessarily preclude the client from participating in the representation or from parenting successfully and safely. Whether the client can assist counsel is a different issue from whether the client is able to parent.

An attorney's obligation to treat the client with attention and respect is not diminished by the existence of a client's disability. See New York Rules of Professional Conduct, Rule 1.14 - Client with Diminished Capacity, subsection (a).

Counsel should secure the assistance of an expert to learn about a client's current or prior mental health diagnosis and treatment (including any medication taken for the condition). If interactions with the client or other information lead counsel to believe that the client may have a condition limiting the client's capacity, counsel should seek expert assistance in determining what if any disability the client has and how if at all it affects the client's ability to work with counsel and/or parent the child.

Counsel should get consent from the client to review mental health records and to speak with former and current mental health providers and should review such records carefully. The attorney should explain to the client that the information is necessary to understand the client's strengths, history, and needs, as well as the client's capacity to work with the attorney. Counsel should also explain that he or she may seek the assistance of a clinical social worker or some other mental health expert to evaluate the client's ability to assist the attorney.

If the client seems unable to assist counsel, an assessment of the client's capacity should be sought. The ethical rules governing clients with diminished capacity make clear that an attorney should seek other assistance in discerning the client's position and interests, prior to even considering a guardian ad litem (GAL). See New York Rules of Professional Conduct, Rule 1.14 - Client with Diminished Capacity. Counsel should seek guidance from service providers, relatives, and others close to the client, as well as a retained or staff social worker or other expert.

Only in the rarest case, if ever, should counsel request a GAL to make decisions for a client. This action clearly communicates to the court that the client's disability is severe and severely undermines the client's position in the litigation with respect to preserving his/her parental rights. Counsel should argue against any application by the agency to assign a GAL for the same reasons. Taking action that undermines the client conflicts with counsel's ethical obligation to advance the client's interests. Furthermore, the court or others can make a GAL application, making it even less likely that counsel should do so.

Seeking withdrawal is "generally seen as the least satisfactory response because doing so leaves the client without assistance when it is most needed." See, e.g., New York State Bar Association Ethics Opinion 746 (2001).

## **New York State Bar Association Committee on Professional Ethics Opinion 986 (10/25/13)**

**Topic:** Whether it is a conflict of interest for a lawyer who represents a mentally incapacitated client in a Medicaid benefits proceeding to also represent the client's sister in seeking to petition for a guardianship for the client where the incapacitated client's stated wishes as to living arrangements are contrary to the sister's position.

**Digest:** It is a conflict of interest for a lawyer who represents a mentally incapacitated client in a Medicaid benefits proceeding to also represent the client's sister in seeking to petition for a guardianship for the client where the incapacitated client's stated wishes as to living arrangements are contrary to the sister's position.

**Rules** 1.7, 1.14

### **QUESTION**

1. May a lawyer who represents a mentally incapacitated adult in a Medicaid benefits proceeding also represent that person's sister in seeking to petition for a guardianship for him where the sister, against the client's wishes, has refused to remove her brother from a hospital and will not permit him to return to her home?

### **BACKGROUND**

2. A Legal Services lawyer was retained to represent a severely incapacitated man to appeal the denial of certain Medicaid services. He has been diagnosed with schizophrenia and mental retardation. A recent evaluation concluded that he is "unable to function autonomously, and he cannot make financial or health decisions on his own. He is significantly mentally retarded." The client is not able to make decisions during the representation and "does not understand what is involved in appealing the denial of Medicaid Services." The client was assisted by his sister in applying for Legal Aid Services.

3. The sister has cared for and lived with the client until recently, when the client accidentally set fire to the sister's home. The sister brought him to a hospital where he remains. The hospital wants to discharge the client and his expressed desire is to return to the sister's home. The sister is unwilling to accept the client back to her home.

4. The attorney states that there is no practical method of protecting the client's interests other than to have a guardian appointed. There is no other family. Social services agencies have extremely limited resources. The sister is willing to serve as the guardian, but the client is so incapacitated that he is not capable of consenting or objecting to the appointment of his sister as guardian.

5. The attorney asks whether he is permitted to represent the sister in a petition for guardianship over her brother.

## **OPINION**

6. The lawyer asks whether concurrent representation of client A with significant diminished capacity and another client (B) who seeks to become the guardian for client A is permissible when the stated wishes of client A are directly contrary to the position of Client B as the prospective guardian. To what extent is the lawyer bound by the arguably unreasonable and ill-considered stated desire of the incapacitated client in assessing whether such a conflict exists? What action is permissible by the lawyer?

7. Concurrent conflicts of interest are governed by Rule 1.7 of the Rules of Professional Conduct which prohibits a lawyer from representing clients with "differing interests." This includes "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest. Rule 1.0(f); See also Rule 1.7 Cmts. [1],[2],[8]. The lawyer is expected to be loyal, protect client confidences and provide independent judgment.

8. In the representation of Client A in the Medicaid appeal, the lawyer learned of the client's stated desire to return to his sister's home. Living arrangements are a fundamental interest of the client as contemplated by Rule 1.7. Unquestionably, if Client A did not have significant diminished capacity, the lawyer could not undertake to represent his sister in any proceeding where Client A's stated desires would be undermined, and in this case directly contrary to the client's wishes, by the lawyer's representation of another client. [1]

9. Thus, the question is whether the client's significantly diminished capacity alters the judgment as to whether the lawyer would be representing "differing interests" if he undertook representation of the sister in the guardianship proceeding. As explained below, it does not.

10. Rule 1.14 seeks to provide guidance to a lawyer in such circumstances. It acknowledges the difficulty of providing diligent and competent representation to clients who have diminished capacity precisely because the client is often incapable of understanding and making decisions about the matter. In such circumstances, even though the representation may be premised upon the goal of maximizing a client's autonomy and dignity, the lawyer may

believe that advocating the client's stated position to be directly contrary to what the lawyer reasonably believes is the only viable choice for the client with significant diminished capacity. May the lawyer maintain a position contrary to the client's stated wishes when that client has significant diminished capacity?

11. Rule 1.14 suggests a course of action for the attorney in such circumstances. [2] First, a lawyer must "as far as reasonably possible" maintain a normal lawyer-client relationship. The fact that a client suffers from mental illness or retardation does not diminish the lawyer's responsibility to treat the client attentively and with respect. Rule 1.14, Cmt. [2].

12. Second, Rule 1.14 permits a lawyer to take protective action when the lawyer reasonably believes that the client is at risk of physical, financial, or other harm unless such action is taken. Before considering what measures to undertake, lawyers must carefully evaluate each situation based on all of the facts and circumstances. "Any condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities on the lawyer." Roy D. Simon, *Simon's Rules of Professional Conduct Annotated*, 662 (2013). One of those responsibilities is to acknowledge that even clients with diminished capacity may have the ability to make decisions or reach conclusions about matters affecting their own well-being.

13. Any protective action taken by the lawyer should be limited to what is essential to carry out the representation. Thus, the lawyer may consult with family members, friends, other individuals, agencies or programs that have the ability to take action to protect the client. The Rule does not specify all of the potential protective actions that may be undertaken, but it makes clear that seeking the appointment of a guardian is the last resort, when no other protective action will protect the client's interests.

14. This opinion presumes that, before considering guardianship, the attorney has considered and exhausted other options. First, the lawyer has attempted to maintain a normal client-lawyer relationship as best as possible under the circumstances. A primary aspect of that relationship is to maintain communications with the client. The attorney has determined that the client's stated desire is to return to his sister's home. Even if the attorney reasonably believes this to be unwise, unreasonable, or otherwise ill advised, the client still deserves attention and respect.

15. Second, before deciding whether to take protective action with respect to the client, the lawyer has a reasoned basis, beyond what he believes to be the client's ill considered judgments, to conclude that the client cannot act in his own best interests and that protective action is necessary. The lawyer unsuccessfully attempted to communicate with the client, obtained information and assistance from the client's sister, and sought a medical evaluation.

16. It is not clear whether there are other individuals, community resources or social services agencies that may be of assistance to the client. Nor is it clear whether other options have been explored prior to seeking the appointment of a guardian. This includes an assessment as to whether or not referral to support groups or social services could provide protection to the client.

17. These alternatives should be exhausted prior to seeking the appointment of a guardian. The situation is particularly fraught for clients with limited financial means and social support networks. There are few social services available to assist such clients, thereby leaving the attorney in circumstances with few options to carry out representation as contemplated by Rule 1.14. Therefore, these circumstances require a lawyer to exercise careful judgment to adopt a course of action that best protects the client's interests.

18. The lawyer must recognize that seeking a guardianship is an extreme measure as it "deprives the person of so much and control over his or life." In the Matter of the Guardianship of Dameris L., 38 Misc 3d 570 (Sur. Ct. NY Cty 2012) citing Rose Mary Bailly, Practice Commentaries, McKinney's Con Law of NY, Book 34A, Mental Hygiene Law § 81.01 at 79 (2006). It has been suggested that the lawyer should seek a guardian only if "serious harm is imminent, intervention is necessary, no other ameliorative development is foreseeable, and nonlawyers would be justified in seeking guardianship." Paul R. Tremblay, On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client, 3 Utah L. Rev. 515, 566. (1997); See 62 Fordham L. Rev. 1073 (1993-1994)

19. Article 81 of the Mental Hygiene Law, allows for the judicial appointment of a legal guardian for one's personal needs, property management or both, when a person is incompetent to conduct his or her own affairs. N.Y. Mental Hygiene Law § 81.02(a); 81.06 et seq. The statute expects that the system is tailored to meet the individual's specific needs by taking into account the incapacitated person's wishes, and preferences. N.Y. State 746 (2001).

20. Assuming that the attorney has undertaken this thorough evaluation of the circumstances, and now reasonably believe that guardianship is the only alternative, that lawyer may seek out others to petition for the guardianship.

21. The guardianship process is initiated by a petition. The lawyer may seek out any available individual, social service agency or private organization to petition for guardianship. Article 81 specifies seven categories of persons who may file such a petition. § 81.06.

22. The court then is required to appoint a court evaluator who will recommend whether the alleged incapacitated person (AIP) requires counsel. The court evaluator will also make recommendations as to who should serve as guardian and make appropriate living arrangements. Any conflicts between the sister and AIP will be addressed by the court evaluator. See e.g., MHL 81.09(c)(5)(xv). It is not apparent whether court evaluators are appointed in all matters as required by statute.

23. The court then considers all of the evidence and determines, by clear and convincing evidence, whether the person is likely to suffer harm because he or she is unable to provide for his or her personal needs and/or property management and cannot adequately understand and appreciate the nature and consequences of this inability. § 81.02 (b).

24. The guardian is to engage in the “least restrictive form of intervention, consistent with the concept that the needs of persons with incapacities are as diverse and complex as they are unique to the individual.” NY Mental Hgy Law §81.01.

25. The attorney may suggest that the sister seek a petition for guardianship and may make suggestions as to individuals or agencies to assist her in completing the petition, but the lawyer may not represent her in petitioning for the guardianship. Her interests are contrary to that of the client. She has clearly stated, contrary to the client’s desires, that she will not permit him to return to her home. Thus, the attorney would be in conflict with his client if he represents the sister and assists her in filing a petition seeking an objective contrary to the client’s stated desire.

26. The lawyer’s position in protecting the client’s interests is complicated by perceived difficulties for lay persons in completing the petition for guardianship and the lack of social service and other resources to assist the family of incapacitated people. The sister may desire to file a petition for guardianship but may be ill-equipped to do so and there may be no assistance available to her. Consequently, it may be that the attorney is the only person who can reasonably seek the appointment of a guardian. In general, a lawyer should only act as petitioner in seeking the appointment of a guardian if there is no one else who reasonably can do so. Simon, Rules of Prof Conduct Annot. at 663, N.Y. State 746 (2001).

27. In general, the interests of the petitioner in a guardianship proceeding are in conflict with that of the client, notably where there will be a contested hearing and the petitioner will serve as a witness. However, where the client does not oppose the guardianship or is incapacitated and cannot express an opinion as to the guardianship, Rule 1.14 implicitly acknowledges that the lawyer may file the petition to seek a guardianship in circumstances where the guardianship will not be subject to a hearing and no one else is reasonably available to file the petition. We previously considered the issue of whether an attorney-in-fact could petition for guardianship for a client and concluded, under the then-existing Code of Professional Conduct, that it was permissible under circumstances such as those presented here where there is no other option and there will not be a contested hearing under Article 81. We considered whether the “dual role” of petitioner in a guardianship proceeding and as client representative was impermissible in these circumstances and concluded that, given other safeguards in the Article 81 proceedings, the dual role was not impermissible. N.Y. State 746 (2001). We affirm that opinion under the Rules of Professional Conduct.

28. Should the attorney file the petition for guardianship, and the court become aware that the sister may be the only person who can be appointed as the client’s guardian, the lawyer

should advise the court of the sister's position regarding the client's living arrangements. The court can then consider whether, in light of the potential conflict between the client and his sister, she is the appropriate guardian.

29. Thus, using the same reasoning, Connecticut has determined that in these circumstances should the lawyer petition for the appointment of a guardian, the lawyer does not need to withdraw from representation on the underlying Medicaid matter. In circumstances involving clients with disabilities, this is not a preferred course of action. See Connecticut Inf. Opinion 97-19 (1997).

30. Assuming that a guardian is appointed, the lawyer should consult with the client and the guardian as to the position to be asserted in the Medicaid matter. The guardian is the representative of the client. The rationale for the appointment of a guardian is to have someone who can make decisions for the incompetent client. Thus, after the appointment of the guardian, the lawyer generally must take direction from that guardian.

31. Finally, Rule 1.14 is often frustrating because it does not provide solutions to all problems in dealing with clients with diminished capacity. It does, however, provide "an intelligible frame of reference for the lawyer and those who might later judge his conduct." Geoffrey C. Hazard Jr. and W. William Hodes, *The Law of Lawyering*, § 1.14:101, p.439. (1990). See Connecticut Inf. Opinion 97-19.

## CONCLUSION

32. It is a conflict of interest for a lawyer who represents a mentally incapacitated client in a Medicaid benefits proceeding to also represent the client's sister in seeking to petition for a guardianship for the client where the incapacitated client's stated wishes as to living arrangements are contrary to the sister's position.

[1] In some circumstances, the concurrent conflict may be waived, but not in this case. Even if the lawyer reasonably believed that he could provide competent and diligent representation to both Clients A and B, Client A is not capable of providing informed consent to such a waiver. Rule 1.7 (b)



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## **Representation in Family Court Proceedings**

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### **Speaker Biographies**



## Speaker Biographies

*Nancy J. Farrell, Esq., Supervising Attorney, Family Court Program, Hiscock Legal Aid Society*

Nancy Farrell recently became the Supervising Attorney for the Family Court Program at Hiscock Legal Aid Society in Onondaga County. She received her law degree from Western New England University in 2011. She is a native Syracusan who has been with HLAS since 2014. Her practice has included custody, visitation, paternity, support, and neglect and abuse matters, with a primary focus on parental defense. In spring of 2015, she assisted in developing the “Removal Watch” team that HLAS created to strengthen parental defense at the emergency removal hearing and throughout the remainder of the case.

*Adele M. Fine, Esq., Monroe County Public Defender’s Office*

Adele Fine is bureau chief of the Family Court Bureau of the Monroe County Public Defender’s Office in Rochester, NY. Her office represents indigent litigants in all Family Court matters for which assigned counsel is statutorily mandated, including child abuse and neglect matters. Ms. Fine graduated from the University of Montana School of Law in 1987. She became managing attorney of Montana Legal Services’ office in Havre, Montana where she practiced poverty, family and Indian law. Upon admission to the New York bar in 1990 she worked in a private firm doing plaintiff’s personal injury, small business and discrimination law. In 1995 she became the executive director of a not-for-profit law firm providing legal services to low-income clients in family and matrimonial matters. She oversaw the merger of that firm with the Legal Aid Society of Rochester in 1998. She then joined the Family Court Bureau of the Public Defender’s Office in 2000, and hasn’t left yet.

*Janet R. Fink, Deputy Counsel, New York State Unified Court System*

Janet R. Fink has served as Deputy Counsel to the NYS Unified Court System since 1994, addressing legislative, training and court reform issues in the areas of domestic violence, juvenile justice, fair trial/free press and family law. In addition to assisting the Chief Administrative Judge on family law-related issues and special projects, she is counsel to the Court System’s Family Court Advisory and Rules Committee, the Statewide Advisory Committee on Attorneys for Children, the Family Violence Task Force and the Advisory Council on Immigration Issues in Family Court. She also coordinated the New York Fair Trial/Free Press Conference through 2009.

She was an Adjunct Professor of juvenile justice at the Benjamin Cardozo School of Law (Yeshiva University) for six years and, from 1991 to 1994, she served as Senior Counsel to the New York State Assembly Codes Committee, where she handled criminal and civil practice, domestic violence, juvenile justice and regulatory legislation. For 16 years, from 1974 through 1990, she was employed as an attorney for children and as an appellate and class action litigator

by the Juvenile Rights Division of the New York City Legal Aid Society, serving for the last six years as the Division's Assistant Attorney-in-Charge.

On the national level, Ms. Fink is a member of the Criminal Justice Council of the American Bar Association and served on the ABA Commission on Domestic and Sexual Violence and as liaison to the ABA Commission on Youth at Risk. She is a past Chair and continues as a member of both the ABA Criminal Justice Section's Juvenile Justice Committee and the Editorial Board of the Section's Criminal Justice Magazine, She also served on the Advisory Board for the publication, Domestic Violence Report. On a state and local level, she serves as Vice-Chair of the Children and the Law Committee of the New York State Bar Association and is a member of the NYS Bar Assoc./Women's Bar Assoc. of NYS Domestic Violence Initiative, the NYS Bar Assoc. Committee to Ensure the Quality of Mandated Representation and Family Court Task Force, as well as the NYC Bar Association Council on Children, the NYS Division of Criminal Justice Services Violence Against Women Act Advisory Committee, the NYS Judicial Institute Family Court Curriculum Committee, the NYS Office of Children and Family Services Children's Justice Task Force, the NYC Family Court Advisory Council and, until 2009, the Family Court Advisory Committee of the New York Supreme Court, Appellate Division, First Department. She is a frequent lecturer on domestic violence, juvenile justice and family law issues and has published articles and book chapters in these areas.

Ms. Fink received the first annual Kathryn A. McDonald Award for Excellence in Service to the Family Court from the Association of the Bar of the City of New York in 1998 and the Howard A. Levine Award for Excellence in Juvenile Justice and Child Welfare from the New York State Bar Association in 2005. She graduated cum laude from Bryn Mawr College in 1971 and received a Juris Doctor from Georgetown University Law Center in 1974.

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*Linda Gehron, Esq., Frank H. Hiscock Legal Aid society*

Linda Gehron President & CEO, Frank H. Hiscock Legal Aid Society (HLA), Syracuse, New York: Linda received her law degree from Syracuse University College of Law with honors. Before being appointed President & CEO, she served as the Supervising Attorney for the HLA Family Court Program. She came to HLA after many years in private practice representing parents as an 18-b attorney, and children as an Attorney for the Child in the family and criminal courts of Onondaga County. She also served as a Supervising Attorney and Lecturer in Law in the Juvenile Advocacy Clinic at Syracuse University College of Law. Linda was a member of the NYS ILS Parent Representation Standards Working Group and has served on the local Child Welfare Court Improvement Project Stakeholders and Legal Issues Subcommittee. She is a member of the NYSBA Committee on Mandated Representation and Committee on Families and the Law. She has written about Family Court for the Onondaga County Bar Reporter and presented on parent representation topics for the NYSDA. Linda was a recipient of the Dillon Award from the Fourth Department for Law Guardian representation of children.

*Hon. Thomas Gordon, Family Court support Magistrate*

Tom Gordon is a support magistrate in Rensselaer County Family Court. He is an Associate Deputy Chief Magistrate for Technology and a member of the Family Court Advisory and Rules Committee. Prior to joining the court system, Mr. Gordon was a supervising attorney at the Legal Aid Society of Northeastern New York where he directed the law student externship program in cooperation with Albany Law School. Prior to that, Mr. Gordon was a supervising attorney with the Juvenile Rights Division of The Legal Aid Society in New York City. He is past president of the New York State Support Magistrates Association. Mr. Gordon received his B.A. from the University of Vermont and his J.D. from Brooklyn Law School.

*Hon. Deborah A. Kaplan, Statewide Coordinating Judge for Family Violence Cases, NYS Unified Court System*

Justice Deborah A. Kaplan was recently appointed Statewide Coordinating Judge for Family Violence Cases. Her office, the Office of the Statewide Coordinating Judge for Family Violence Cases (OFVC), works collaboratively with the state's administrative judges and judges and staff who handle domestic violence and integrated domestic violence matters statewide with the goals of refining practices and promoting better and more consistent outcomes in matters involving family violence, encouraging continuing innovation and increasing the breadth and depth of support for the courts.

Another related and critically important component of the OFVC is developing programs, protocols and procedures to improve how the court system addresses the growing number of cases involving the state's older population, including allegations of elder abuse both in the civil and criminal context. The OFVC also houses the New York State Judicial Committee on Elder Justice which is collaboration between the court system, non-profit service providers, government agencies, academics, mediators, medical professionals, social workers, law enforcement, prosecutors, legal services attorneys and other members of the bar. In collaboration with these community partners, the OFVC is working to ensure that all court personnel are aware of and responsive to the needs of older litigants and the particular challenges they may face. Justice Kaplan is an elected Justice of the Supreme Court and has presided over a Matrimonial Part for the past eight years. She has been a judge for 15 years. In addition to her new statewide position, she continues to maintain a matrimonial caseload. Judge Kaplan was recently appointed to co-chair the New York Hague Convention and Domestic Violence Bench Guide Consulting Committee. She was also named to the NYC Mayor's Domestic Violence Task Force and the New York State Bar Association/Women's Bar Association of the State of New York Domestic Violence Initiative and serves as chair of the Education and Training Subcommittee. Judge Kaplan also currently co-chairs the Supreme Court Gender Fairness Committee and serves on the New York State Judicial Advisory Council and the Women in the Courts Committee. She is a past president of the Women's Bar Association of the State of New York. Judge Kaplan received her undergraduate degree from SUNY Albany and her JD from St. John's University School of Law.

*Amanda M. McHenry, Esq., Assistant Supervising Attorney, Family Court Program, Hiscock Legal Aid Society*

Amanda has worked with the Onondaga County Hiscock Legal Aid Society since May 2015, and was recently promoted to Assistant Supervisor for the Family Court Program. Prior to HLAS, she worked for a private Family and Matrimonial law firm in Albany, NY. Amanda graduated from Albany Law School in May 2014, and from SUNY Oswego with a B.S. in Political Science in 2010. Amanda's primary practice has been parental defense in Onondaga County. She provides zealous advocacy for all of HLAS clients who choose to participate in the Onondaga County Family Treatment Court pilot program. Additionally, Amanda has been an integral part of the "Removal Watch" team created by HLAS two years ago to ensure clients are represented from the very beginning of their case.

*Jeremy Morley, Esq.*

Jeremy Morley is one of the world's leading international family lawyers. He works with clients around the world from New York, with a global network of local counsel. Jeremy is the author of "International Family Law Practice," the leading treatise on international family law in the United States. He is also the author of "The Hague Abduction Convention: Practical issues and Procedures for Family Lawyers." He is the former co-chair of the International Family Law Committee of the International Law Section of the ABA. He is a member of the International Academy of Family Lawyers.

He was born in Manchester, England and has taught in law schools in the United States, Canada and England.

Jeremy lectures on international family law topics around the world. He has been a frequent guest on television and radio shows on the topic of international child abduction and international divorce law and has been featured in the print media on numerous occasions. Jeremy frequently appears as an expert witness on international child abduction prevention and recovery issues. He has provided expert testimony and written evidence to courts in many jurisdictions in the United States and overseas, including expert evidence as to the international child custody laws and practices of many countries, including Brazil, Bulgaria, Canada, China, Colombia, Costa Rica, Czech Republic, Egypt, England, France, Germany, Ghana, India, Indonesia, Iran, Italy, Japan, Jordan, Korea, Kuwait, Lebanon, Malaysia, Mexico, Morocco, Pakistan, Philippines, Poland, Qatar, Russia, Saudi Arabia, Syria, Singapore, Taiwan, Turkey, UAE and Venezuela.

*Marguerite A. Smith, Esq.*

Marguerite A. Smith was admitted to the NYS Bar in 1975, after graduating from NYU School of Law. She is also admitted to practice in the Eastern, Southern and Western Districts of the federal courts sitting in New York. While employed in Region 29, National Labor Relations Board, after law school, she began volunteer service for the Shinnecock Indian Nation, of which she is an enrolled citizen. She continued to provide "Pro Bono" legal services for her Nation,

from time to time working along with Native American Rights Fund and other counsel for the Nation. She worked in various corporate law departments and in private practice, and resigned from service with the Nation to work for the NYS Department of Law, Office of the Attorney General, in the Mineola, Long Island Regional Office. She later worked as a Principal Law Clerk in the Supreme Court, Suffolk County. In 1992 she entered into full-time Private Practice of Law, conducting a general practice based in Suffolk County and also offered services as a mediator and arbitrator in employment, family and community disputes.

She resumed her involvement in the legal affairs and governance of the Shinnecock Indian Nation, including the effort to gain federal recognition, a status that was confirmed for Shinnecock with listing as Indian Tribe #565 in October 2010. During this time she was also active in the establishment of Shinnecock Indian Health Services, and today serves as Project Coordinator for the Shinnecock Community Health Assessment, with the Nation as a sub-grantee of the CDC initiative called Good Health and Wellness in Indian Country.

Ms. Smith recalls an early involvement with ICWA when, her Nation, then designated as a New York State-recognized Indian Tribe as it had been for two nearly two hundred years before, received notification of an impending adoption placement. In that case, a well-known adoption agency was attempting placement with a non-Indian of an offspring of a young Shinnecock male living in New York City. She has continued throughout the years to advise her Nation, and other Nations and individuals, with regard to the handling of ICWA cases, sometimes engaging in private representation of parents and grandparents and at other times representing the interests of the Shinnecock Nation. She has been a frequent lecturer on ICWA and other subjects. She serves on The Statewide Multidisciplinary Child Welfare Work Group, a joint activity of the NYS Unified Court System Child Welfare Court Improvement Project and the NYS Office of Children and Family Services, and remains a regular participant in the work of Suffolk County's Family Court Child Welfare Court Improvement Project.

*Gary Solomon, Esq., Legal Aid Society's Juvenile Rights Practice*

Gary Solomon is the Director of Legal Support for The Legal Aid Society's Juvenile Rights Practice. In that capacity he participates in the training of staff and acts as a supervisor, consultant and advisor to staff; prepares practice memoranda and other continuing legal education materials and maintains the Juvenile Rights Practice's electronic legal research system; acts as consultant to the Juvenile Rights Practice's Appeals Unit and Special Litigation & Law Reform Unit; and participates in New York State Appellate Division-sponsored training programs for assigned counsel, and Unified Court System-sponsored training programs for judges and court attorneys. Mr. Solomon prepares the weekly JRD Newsletter, a compilation of annotated court decisions which is made available to judges, lawyers and other professionals throughout New York state and elsewhere, and is the principal author of Volumes One, Two and Three of the Practice Manual for Children's Attorneys. He has authored chapters on child abuse and neglect and termination of parental rights proceedings which appear in West Publishing's New York Family Court Practice, and has written practice commentaries for LexisNexis/Matthew Bender.

In 2003, Mr. Solomon was awarded the Howard A. Levine Award For Excellence in Juvenile Justice And Child Welfare by the New York State Bar Association, Committee on Children and the Law. In 2006, Mr. Solomon received the Kathryn A. McDonald Award For

Excellence in Service to Family Court from the Association of the Bar of the City of New York. In 2007, Mr. Solomon received the Orison Marden Award For Outstanding Service and Dedication to the Organization and to the Clients from The Legal Aid Society of New York City.

*Audrey Stone, Esq., Chief Counsel to the Office of the Statewide Coordinating Judge for Family Violence Cases, NYS Unified Court System*

Audrey Stone, Esq. serves as Chief Counsel to the Office of the Statewide Coordinating Judge for Family Violence Cases at the Unified Court System. Previously, Ms. Stone served as the Managing Director of the Domestic Violence & Sexual Assault Practice at Nardello & Co., a global investigative firm. For almost a decade she acted as the Chief of the Special Prosecutions Division and a Second Deputy District Attorney in the Westchester County District Attorney's Office. In that capacity she oversaw the prosecution of domestic violence, child abuse, elder abuse and human trafficking cases in Westchester County. As a prosecutor, Ms. Stone co-chaired the New York State District Attorney's Association Subcommittee on Family Violence and Sexual Assault and the Westchester County Anti-Human Trafficking Task Force. She was also appointed to the New York State Domestic Violence Fatality Review Team. Ms. Stone has written extensively on family violence issues and trained judges and attorneys nationally. She was formerly the director of the Pace Women's Justice Center and adjunct professor of law at Pace University School of Law. She graduated with honors from Brown University and with honors and order of the coif from NYU School of Law. Ms. Stone is currently a co-chair of the Domestic Violence Committee of the Westchester Women's Bar and an advisor to the Pace University School of Law Criminal Justice Institute. Contact: aestone@nycourts.gov