

**Glossary of Court Terms and Phrases**  
**By Gene D. Skarin, Attorney 7/08/25 OCFS draft)**

**Child Protective Services and Family Court Legal Framework**

**Jurisdiction**

**Subject Matter Jurisdiction:** In order for the Family Court to hear and decide a case, it must have “subject matter jurisdiction.” Usually, subject matter jurisdiction is defined in the Constitution and/or law which created the court. The Family Court has jurisdiction over cases involving family support, juvenile delinquency (persons over 12 but under 18 years of age who allegedly commit certain criminal acts), persons (under 18) in need of supervision (PINS), paternity, custody/visitation, guardianship, adoptions, termination of parental rights, voluntary placement agreements, surrenders, permanency hearings for children in out of home care, family offense cases, and child protective proceedings (child abuse and neglect).

**Personal Jurisdiction:** In order for the court to exercise jurisdiction over a person or entity, that person or entity must become part of the court proceeding. A court cannot issue a valid order over a person or entity who is not subject to the court’s jurisdiction. Normally, the person seeking court involvement has consented to the court’s jurisdiction. The court acquires jurisdiction over the other parties when that person or entity is served with a valid summons consistent with the law. Persons over 18 years of age not a party to the proceeding may serve a summons. Since CPS workers normally are considered “agents” of the Commissioner who is a party to the proceeding, caseworkers should NOT be serving a summons. Some counties use process servers or Sheriffs to effectuate service.

When needed, the court may order “substituted service” under the CPLR which could include leaving the summons with someone of suitable age and discretion, or publication, or in a manner as the court directs. The court may also order a “diligent search” for a respondent as a prerequisite to ordering substituted service.

**United States Constitution**

The U.S. Supreme Court has held that parents have a fundamental constitutional right to raise their children and children have a constitutional right to remain with their family, whenever possible. The government can only intrude in limited specified circumstances.

The US Supreme Court has held “The liberty interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this court.” Similarly, the children have a parallel right to be reared by their parent. CPS has a legal duty to undertake reasonable efforts to safely keep a child with their parent and may only seek removal when reasonable efforts will not maintain the child with their parent. This is subject to Family Court review upon intervention.

The 4<sup>th</sup>, 5<sup>th</sup>, and 14<sup>th</sup> constitutional amendments are especially important during a CPS investigation of a State Central Register report as well as when CPS seeks Family Court intervention.

4<sup>th</sup> Amendment: The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The 14<sup>th</sup> Amendment: Prohibits the states from denying any person life, liberty, and property without due process of law.  
It also requires the states to provide equal protection under the law.

Family Court Act § 1011 regarding child protective proceedings states: (This article) ... is “designed to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met.”

CPS must diligently adhere to the statutory mandates of the Social Services law, the Family Court Act, State Regulations (18 NYCRR----) having the force of law, OCFS Administrative Directives as well as binding court precedents and interpretations. Of course, caseworkers must adhere to their own county policies and supervisory directives within their chain of command.

**Due Process:** The due process right, established by the Fourteenth Amendment, guarantees that the government cannot take a person's basic rights to “life, liberty, or property, without due process of law.” The due process right is designed to protect citizens from actions taken by state government, counties, towns, and cities. Due process is a requirement that legal matters be resolved according to established rules and principles and that individuals be treated fairly. Due process applies to both civil and criminal matters.

**Procedural Due Process,** Mandates that the government (CPS) follows the proper procedures when it seeks to interfere with a person’s life, liberty, or property. In other words, all actions must be in accordance with the law and constitutional rights.

**Substantive Due process.** Is there is a sufficient substantive justification, a good enough reason for such an interference and/or deprivation?

**“1983” Actions:** The United States Civil Rights Act (42 U.S.C. §1983) is often used by parents under the theory that CPS acting under color of state law, violated some persons constitutional rights. (Of course, lots depends on whether certain rights have been clearly defined.) **In addition to parents, children have due process rights and lawsuits can be filed on their behalf for claimed violations of their rights.** Such cases are brought in Federal District Courts. While CPS has a duty to investigate allegations of child abuse and maltreatment, parents have a fundamental right to raise their child and to stay together as a family. However, a parent does not have a right to abuse or neglect a child since the children also have rights. This is the balancing act that CPS and the courts deal with every day.

**New York State Constitution:** The Constitution of the State of New York establishes the structure of the state government and details the fundamental rights as New York State citizens. Among other things, the State Constitution sets forth the organization and jurisdiction of the Family Court. Each county in New York has a Family Court which means there exists sixty-two Family Courts in our state.

**Family Court Act (Article 10):** The statute (written law passed by the NY legislature (Assembly and Senate) and approved by the Governor), which governs child protective proceedings in New York. Other statutes relevant to child protective proceedings include the Social Services Law and the Domestic Relations Law, Civil Practice Law and Rules, and Penal Law. Additionally, NY law must conform to certain Federal Laws and Regulations to be eligible for “federal financial participation” for the state and county costs in providing child welfare services. Child protective proceedings are also governed by the relevant "common law", Judge-made rulings from higher courts or "precedents" which lower courts must follow.

### **Applicable Laws, Regulations, and Case law**

#### **NY Family Court Act (FCA)**

#### **NY Social Services Law (SSL)**

#### **NY Domestic Relations Law (DRL)**

#### **NY Penal Law (PL)**

#### **NY Civil Practice Law and Rules (CPLR)**

#### **NY Codes, Rules and Regulations -Social Services (18 NYCRR XXXX)**

Issued by Office of Children and Family Services (OCFS) binding upon NY counties. Many regulations in child welfare practice have the “force of law” (SSL § 427. Regulations of the commissioner. 1. The commissioner shall adopt regulations necessary to implement this title.)

#### **NY Codes, Rules and Regulations- Uniform Rules for the Family Court (22 NYCRR §205.)**

The Office of Court Administration issues rules and regulations applicable to Family Court proceedings many of which pertain to child protective proceedings. For example, Section 205.83 sets forth the parameters of terms and conditions of a Dispositional order under FCA § 1053(suspended judgment), §1054(release to a non-respondent) and §1057(release usually under supervision to a respondent).

### **POLICIES\*(from OCFS website)**

**Administrative Directives (ADM)** OCFS notifies local departments of social services, voluntary agencies, and other entities of new or revised policies, procedures, and forms or publications, which must be followed/used and require specific action. ADMs reference

relevant state and federal statutes and regulations. \*

**Informational Letters (INF)** Goal is to clarify or amplify existing policies and procedures for local departments of social services, voluntary agencies, and other entities. INFs may provide general educational information or informational resources, distribute a revised list of contacts, or announce new regulations and state and federal laws. An INF does not transmit new or revised policies, announce new programmatic mandates, or require actions.

**Local Commissioners Memoranda (LCM)** transmit information to commissioners of local departments of social services on specific topics. An LCM generally affects all local departments of social services statewide. Information transmitted by an LCM may include notification of funding, statewide audit results, or instructions pertaining to administrative procedures and related time frames. An LCM does not transmit new or revised policies or announce new programmatic mandates.

**Child Protective Services Manual:** Excellent resource for child welfare workers. The manual provides a comprehensive guide that incorporates current law and regulation as well as policies and procedures for CPS. It is updated frequently and is available on the OCFS website at <https://ocfs.ny.gov/programs/cps/manual/2024/2024-CPS-Manual.pdf>

**Local Policies and Procedures:** Counties have their own local policies and procedures in dealing with various issues all of which must be consistent with the federal and state law, regulations, and policies.

### **Binding Appellate Court Decisions**

**Precedents from the Appellate Division, NY Court of Appeals, or Federal Courts:** Higher courts often interpret the statutory or case law as well as the Constitution and other issues. Precedents are meant to be followed. Additionally, the Appellate Division can review questions of law and fact in affirming, reversing, or modifying a family court decision. Please note that any party to a proceeding may appeal to the Appellate Division.

### **Family Court Article Ten Participants**

**Family Court Judge:** Elected official who decides cases and related issues in court. (Appointed by the Mayor in NYC.) Additionally, Judges are responsible to control the conduct of counsel and impartially decide cases based upon legally admissible evidence, the law and attorney arguments. In Family Court, the Judge decides both the facts and applies and interprets both the statutory and case law to the proven facts presented. Contrast that to cases where a jury decides facts like in most criminal cases. Decisions of the Family Court can be appealed to the Appellate Division by any party to the case.

All judges must adhere to the following under 22 NYCRR §100.3

A judge shall perform the duties of judicial office impartially and diligently.

(1) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(2) A judge shall require order and decorum in proceedings before the judge.

(3) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(4) A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, gender identity, gender expression, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct.

Court participants address the judge as “your honor”.

**Court Attorney Referee:** This court official may hear Permanency Hearings as well as Article Six custody/guardianship/visitation cases. They work for a Judge who may accept or reject or modify a decision of the referee. Their decisions are rarely rejected by the Judge.

**Court Attorney/Law Assistant:** This attorney works for the court system and the specific Judge. The Court Attorney will meet with attorneys to oversee a possible settlement of a case as well as overseeing discovery issues prior to a possible trial. Often, the Court Attorney will be involved in selecting future court dates for a case.

**Part Clerk:** This clerk sits near the Judge and prepares orders for the Judge to sign as well as performing other clerical tasks.

**Uniformed Court Officer(s):** Responsible for court security. New York State Court Officers are designated as New York State peace officers under Criminal Procedure Law § 2.10; The powers of peace officers are listed and defined under CPL §2.20. In Family Court, a Court Officer gathers the parties to a case and calls the case into the courtroom when it is ready. In some counties, a bailiff or court clerk may handle the gathering of parties.

**The Microphones:** Most court reporters have been replaced by electronic recording devices on child protective cases. (These microphones do NOT amplify.) Family Court is a court of record. If there is a need for a transcript of hearing(s) such as when there is an appeal, a transcript will be prepared from the recordings. This transcript is usually referred to as “the minutes”.

**Petitioner:** In child protective proceedings, this is the person/agency who is "petitioning" the court for its intervention or use of its powers. The "Petitioner" is like the "Plaintiff" in a regular lawsuit. In child protective or termination of parental rights cases, the Petitioner is the Commissioner or in TPR cases the contract agency. The caseworker is ordinarily the “agent” for the Commissioner and, as such, swears to the allegations of the petition upon

information and belief. Under the law, the primary responsibility for initiating Article Ten proceedings has been assigned by the legislature to Child Protective agencies which may file a petition whenever in their view court proceedings are warranted.

**Petition:** Filed with the court. Sets forth the allegations as to why the court should make certain findings such as why a child is an abused or neglected child as defined by the law, or why parental rights should be terminated, etc. Petitions must be “verified”.

**Verification:** A verification is a statement under oath that a pleading is true to the knowledge of the deponent, except as to matters alleged under information and belief. Caseworkers usually sign petitions as agents of the Commissioner since being a governmental entity, the verification may be made by any person acquainted with the facts.

**County Attorney or Department of Social Services Attorney:** Represents the County Commissioner of Social Services before the Family Court. When you go to court, this is your department’s attorney who will represent you in your official capacity, not in your personal capacity. Attorney/Client privilege applies to information exchanged within the relationship and is not subject to pretrial discovery. Attorneys may draft petitions based upon the information provided from the investigations. In order to file a case, the DSS (or county attorney) must certify that there is a valid court case supported by evidence. While the attorney must determine if there exists a *prima facie* case under the law, they do not make social services determinations as to risk and safety. A *prima facie case* is a term used to describe a case with enough proof to proceed.

**Caseworker:** The **Child Protective Worker** appears in court on behalf of the county Commissioner, usually on an Article Ten case. Their role is to advocate for the assessed positions consistent with the safety and best interests of the child(ren). Caseworkers present factual information to the court under oath. Often, a caseworker will provide testimony at hearings subject to direct and cross examination. Working with the DSS attorney, the caseworker represents the county’s position and not necessarily their own.

**Party:** One who has a right to appear in court and to participate in the proceedings by filing or making a motion, subpoenaing witnesses, and documents, and examining persons who testify. For example, a foster parent becomes a “party” at the permanency hearing stage when a child is in care but usually not before.

**Respondent:** This is the person who must answer the petition, the person who is being charged with abuse or neglect. The “respondent” is similar to the “defendant” in a regular lawsuit. Often several people are named as respondents. To be a respondent, you must be the child’s parent or other person legally responsible (PLR). A child will be the respondent when charged in a Juvenile Delinquency (JD) or Person in Need of Supervision (PINS) case.

**Non-Respondent Parent:** A non-respondent (or uncharged) parent has the right to notice and to appear and participate as an interested party intervenor in a child protective proceeding for the purposes of seeking temporary or permanent custody of a child who is the subject of a child protective proceeding. This person may be a resource for the child. Such parent should be served with a copy of a “Notice of Pendency” informing them of

their rights including the right to intervene on the court proceeding as well as their obligations should the child come into care. (See below) Other written notices as to their rights must be served such as OCA form 10-7d (Notice to Non-Respondent parent). As per a February 2025 decision of the Appellate Division, Second Dept. absent their in court consent, the Non-Respondent cannot be placed under court ordered supervision at a minimum prior to a dispositional hearing and likely upon disposition. It will be interesting if other appellate divisions rule otherwise which would likely force the NY Court of Appeals to weigh in. Stay tuned.

**Person Legally Responsible(PLR):** Under Article Ten a person other than a parent can be named as a respondent. This includes the child's custodian, guardian, any other person responsible for the child's care at the relevant time. Custodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child. Often used in situations where the friend of the parent causes or contributes to the abuse or neglect. This could include people with no parental rights. Therefore, rarely, if ever, will this PLR be entitled to reunification services. Mostly, CPS would be seeking an Order of Protection on behalf of the child against a PLR.

**Factors when determining if a person is a PLR.** Whether a person is a PLR is a discretionary fact-intensive inquiry which may vary according to the circumstances of a case. These could include:

1. The frequency and nature of the contact.
2. The nature and extent of the control exercised by the respondent over the child's environment.
3. The duration of the respondent's contact with the child.
4. The respondent's relationship to the child's parent.

**Respondent's Attorney or "18B" Attorney (assigned counsel):** Respondents who can afford to hire an attorney should do so. Otherwise, a respondent is likely to be eligible for an "assigned counsel". The term "18B" comes from the section of the NY State County law permitting the City or the County to pay private attorneys who apply to a "panel" to be assigned to represent persons who cannot afford to retain private counsel. Often a legal service organization specializing in defending parents in court will be assigned. If a respondent who can afford counsel chooses not to do so, they can proceed "Pro Se." but that normally is not a good idea, and the Judge will likely advise the respondent why this is so. Normally, each respondent has their own attorney since there exists real or possible conflicts of interests.

**Non-Respondent's Attorney or "18B" Attorney (assigned counsel):** A non - respondent is a party to the proceedings who also may be eligible for assigned counsel.

**Interested Party Intervenor (Relatives):** In certain instances, a child's adult sibling, grandparent, aunt, or uncle, may be permitted to intervene for the purposes of seeking temporary or permanent custody of the child. Such motions to intervene are ruled on by the court, which is under a mandate to "liberally grant" them. When a child is removed

from a home, the petitioner is required to inquire into relatives and give them notice of their right to seek to care for a child as a foster parent or to obtain custody of the child. Potential relative

resources or suitable persons should receive a notice of the pending child protective proceeding when they are being considered as a caretaker for a removed child. The law is vague in defining who is a relative. "Relative" means any person who is related to the child by blood, marriage or adoption and who is not a parent, putative parent or relative of a putative parent of the child. In some instances, CPS can treat non-relatives as if they are relatives or the purposes of placements. "Suitable person" means any person who plays or has played a significant positive role in the child's life or in the life of the child's family. FCA §1017 recognizes "suitable persons" as possible resources for a removed child.

**Child:** A person alleged to be abused or neglected who is less than 18 years of age at the time of the initiation of the petition. In Juvenile Delinquency cases, the child is less than 18 years of age but at least 12 (exception for certain murder/manslaughter type crimes). In Person in Need of Supervision cases, the child is also less than 18. If the child is over 18 years old and is abused or neglected by a parent, the remedy is likely to be a Family Offense proceeding in Family Court or a criminal case.

**Attorney for the Child (AFC)** (previously called the Law Guardian): An attorney who represents the interests of the subject child in a child protective proceeding. Outside NYC, the attorney is likely from the "assigned counsel" panel or an "18b"). In NYC most AFCs are supplied by the Legal Aid Society Juvenile Rights Division or Lawyers for Children. In some counties, Office of Attorneys for Children have been contracted by OCA to be the first assigned AFC. If the children on a case have conflicting positions, another AFC will be assigned to represent the other child. Does the AFC represent the best interests of the child or the child's wishes under Article Ten? Answer: Mostly child's wishes if child is of sufficient age and maturity with a few exceptions where the AFC may substitute judgment.

**Guardian Ad Litem:** If a respondent is by reason of mental incapacity unable to cooperate with their lawyer or for any other valid reason, the court may appoint a Guardian Ad Litem to represent the respondent's interests. The "G.A.L." is not the same and is separate from the retained or assigned attorney. While mental incapacity might be a defense on a criminal case, it is likely to be another allegation on a neglect case where it is alleged that a parent cannot provide adequate care.

**District Attorney:** In all cases involving abuse, the Corporation Counsel of the City of New York and outside the city of New York, the appropriate district attorney shall be a necessary "party" to the proceeding. They may or may not appear or may just get relevant documents. Many times, the District Attorney will be prosecuting a concurrent criminal case involving similar allegations. DSS should monitor any concurrent criminal cases.

**Foster Parent:** A foster parent or a person with care of a child may appear as of right in court as a party to a permanency hearing. At other times, the court may allow the foster parent to appear as an interested party. Foster parents having continuous care of a child for twelve months through as authorized agency are permitted by law to appear on any case involving the custody of a child. Foster parents should act consistent with an agency's



permanency plans and goals. While foster parents are entrusted with and are responsible for the child's care, legal authority for decision-making remains with the agency. A foster parent may be eligible for assigned counsel if qualified. The Reasonable and Prudent Parenting Standard of the federal **Preventing Sex Trafficking and Strengthening Families Act** offers the opportunity for children in foster care to have a more "normal" childhood experience while in care. The standard also offers foster parents new rights and flexibility in day-to-day parents.

### **Court Related Orders and Documents**

**Court Ordered Investigation (C.O.I. a/k/a FCA § "1034 (1)" investigation)** : The Family Court may order a report to determine whether there is any evidence of child abuse or neglect. Frequently, whenever a parent appears in court on a case not involving CPS (custody, visitation, family offense, support, other) the court may order the "C.O.I." to assure the well-being of the children or to determine if county child welfare should provide services to a family. The state central register must accept the court referred reports regardless of the allegations.

(Note: CPS should only be doing a "child protective" investigation and not a "best interest's" investigation. Some courts may seek to avoid a full custody hearing by using 1034 to make a recommendation based upon CPS or Forensic Interview reports, a decision which is supposed to be decided by the court after a plenary hearing. This remains a contentious area of the law and in my opinion, a misuse of child protective services resources.)

**Access Orders (FCA §1034-(2) SSL §424.6-a 6-b):** If a caseworker is denied Access to the child and/or the premises, the county may seek a court order to have the child produced at a specific place or to gain access to the premises. The Judge must make certain findings before it grants such an order to satisfy the 4<sup>th</sup> Amendment of the Constitution. This order can be sought before any petition is filed in court. Parents have a right to deny access. However, the CPS workers are responsible to investigate SCR reports. Whenever you are denied access, you MUST confer with your supervisor and often your attorney. Please see 07 OCFS ADM 07 for specific details on requesting access when denied access to the child or premises. Sometimes this is called a "search authorization". Regarding law enforcement involvement, a 1034.2 order is equivalent to a search warrant for 4<sup>th</sup> Amendment purposes.(Shaheed v Kroski, 833 F. App'x 868.( 2<sup>nd</sup> circuit 2020).

**Petition:** This is the complaint or application filed in court which contains allegations which petitioner intends to prove before the court which would enable the court to issue court orders. The types of petitions we file normally would be child abuse, severe abuse, or neglect, and Termination of Parental rights proceedings. We also file petitions for approval of a voluntary placement agreement, surrenders, and destitute children. We also can be involved with aspects of cases involving juvenile delinquency (persons under 18 years of age who commit criminal acts), persons in need of supervision (PINS), paternity, custody/visitation, adoptions, permanency hearings for children in out of home care, and

family offense cases. Additionally, Caseworkers may file guardianship including kinship petitions, and support petitions especially for children in foster care.

**Answer:** A respondent can file an Answer to the Petition contesting the allegations. Surprisingly, this is uncommon. A respondent sometimes demands more specificity through a Demand for a Bill of Particulars. While the Family Court Act does not specifically address the need for a formal Answer, it is allowed under the applicable Civil Practice Law and Rules.

**Docket Number:** Every filed case has a court assigned docket number. Each child's petition has a docket number county specific. For example, a Neglect Petition filed in XXXX county will likely have a docket number such as N 1245/24. A sibling's derivative case filed at the same time would likely be N 1246/24. An abuse case would likely have a docket number starting with NA. A custody case would be a V docket. This number would be separate and apart from any county number.

**Summons:** A written notice, served on the respondent, directing his or her appearance in court. Normally, it must be personally served. Service is a prerequisite for the court to exercise personal jurisdiction over the "person" of a respondent. Normally, the Petition is served with the Summons. If the whereabouts of a respondent is unknown, the court may order a "Diligent Search" for CPS to check certain data bases and make other inquiries to see if the whereabouts of the respondent can be ascertained. If a party cannot be located, the Court may order "substituted service" such as publication of the summons to satisfy due process. Usually, the Summons and Petition are served in by a process server, or a Sheriff may serve the papers. Caseworkers do not serve summonses.

**Warrant of Arrest:** An order directing police or a peace officer to arrest the individual named and bring him or her before the court. The court may issue a warrant if the person failed to obey the summons, if the person fails to appear on a subsequent adjourned date, or if there is good cause (ex: the safety of the child is in jeopardy). Often a court will issue a Warrant but "stay" its application to give the person a chance to voluntarily appear in court by a specified date. Should the person fail to do so, the court will direct the arrest be executed.

**Return on a Warrant:** The person has been arrested and is brought before the Court. With this unscheduled appearance you may be summoned to court to set forth the agency's position as to the children and the respondent.

**Notice:** Usually, a formal notification of a right or rights, required by the law, regulations, or policy. Usually required by Due Process whereby a person is put on notice that there is intent to take a specified action. Normally, it would inform the person of their rights to oppose, be heard, or to set forth their position as to the contemplated or completed action. Whenever a report is accepted by the State Central Register((SCR) a Notice of Existence (NOE) will inform the subject of the report of their rights as to the report and possible challenges to "indicated" reports.

**Notice of Removal:** If a child is removed on an emergency basis (FCA §1024) or by a pre-petition court order (FCA §1022) OCA form 10-1 should be served advising a subject of their rights including challenging the need for a removal under FCA §1028. (New York ACS has their own notice of removal form.)

**Notice of Pendency:** A non-respondent parent should be served with this notice, along with the summons and petition. It advises the parent of the right to appear and participate in the child protective proceeding including the possibility of gaining temporary or permanent custody of the child.

**Motion:** Usually, a written or oral application to the court seeking a court order. Usually, written Motions are served with a **Notice of Motion or an Order to Show Cause** informing the parties of the time and place of the application and the relief sought.

**Subpoena:** A court process directing someone to appear in court at a given time to give testimony on a matter. The court or attorneys for any of the parties may issue a subpoena. They are supposed to be served personally, like a summons, with a \$15.00 fee. If you receive a subpoena, contact your attorneys immediately. ,,

**Subpoena Duces Tecum:** A subpoena directing the production of records or materials. NOTE: If you ever receive a subpoena to appear in any court or to produce any CPS or child welfare records, always seek the assistance of your attorneys since there may be issues of confidentiality of records, entries, or materials such as HIV information which may have to be resolved. Violating confidentiality can result in civil and criminal sanctions. A subpoena is signed by a judge can also be challenged based upon confidentiality laws. There are many exceptions such as requests for information from law enforcement and prosecutors such as District Attorneys. Therefore, it is wise to run such requests by your supervisors and attorneys.

**Court Order:** An order issued by the court addressed to one or more of the parties. The willful failure to obey a court order may sometimes lead to a contempt of court citation. All court orders must be obeyed unless your attorney says it is “stayed” either by the family court or a higher court. Always make sure you know what is expected of you when you leave the court. Ask questions of your attorney.

**Remand Order:** A court order directing that the care of the child be given to someone other than the respondent. Normally, a child is "remanded" to the Commissioner of Social Services (ACS in NYC). Sometimes, there are variations; so be sure you know the child's legal status before you take any action. Sometimes the court will use the terms “temporary placement.”

**Imminent Danger:** Standard by which the Family Court must meet in order to temporarily remove a child from the care and custody of a parent. The NY Court of Appeals held that “(the) child must appear to suffer from abuse or neglect of a parent or other person legally responsible for the child's care to the extent that immediate removal is necessary to avoid imminent danger to the child's life or health.”

In the case of *Nicholson v. Scopetta*, the New York State Court of Appeals ruled that the Family Court must apply a balancing test when deciding whether a child should be removed from their home. Although the Family Court is required to conduct the balancing test, CPS must also balance the risk of emotional harm a removal may cause against the threat of physical and/or emotional harm if the child remains in the parent's care. CPS must be able to explain to the court why it was determined that the risk of physical and/or emotional harm by staying with the parent is greater than the risk of harm that may be caused by removal.

With each removal decision, the CPS must consider this question: Is the physical and/or emotional harm to the child greater if the child remains with the parent than the harm a removal may cause?

**Reasonable Efforts:** CPS must show that specific reasonable efforts, where appropriate, to prevent or eliminate the need for removal of the child(ren) from the home were made or show that the lack of such efforts were appropriate under the circumstances. (the court will continually review the reasonable/diligent efforts of the agency as well as the parental response throughout the life the court case until the child is either returned or achieves other permanency.)

**Best Interests of the Child:** CPS must show that remaining home or being returned home would be contrary to the child's best interests.

**Parole Order:** This term is usually used when the child is allowed to remain in the care of the parent, normally under CPS supervision. The child could be "paroled" to a relative or friend by the court. Again, there are variations on "remand"/"parole", so be sure to check with your attorney on the exact meaning of orders. Both "remand" and "parole" are terms used before final disposition (see below). (The term "parole" is rarely used outside New York City. The terms used are "release to" or "custody to parent under supervision" or similar.)

**Placement:** This is an order of whereby the court "places" the child with the Commissioner of Social Services. Sometimes the court will use the term "temporary placement" prior to a dispositional order or "final disposition" if the placement is made final at a dispositional hearing. Alternatively, it can place the child with the Commissioner of Social Services, but order that the child reside with a suitable relative within the third degree specified by the court or with a specified certified foster parent. Placements are now measured from the time the child first comes into care.

**Direct Placement:**

The court can also directly place the child in the custody of a relative or other suitable person. Local DSS will supervise and be subject to Family Court oversight although the local CSS does not have the same authority as it would in a placement with CSS situation.

**Interstate Compact on Placement of Children (ICPC):** If a New York foster child is sent to live out of state, such placements are required to go through the ICPC. Recently, the NY Court of Appeals held that the requirements of the ICPC do not apply to a child who is released to an out-of-state parent. You must ask your attorney for guidance on how to handle ICPC cases.

**Qualified Residential Treatment Program Review(QRTP):** The court must review whether the needs of the child can or cannot be met through placement in a foster family home. The court must review if the placement of the child in a Qualified Residential Treatment Program provides the most effective and appropriate level of care for the child in the least restrictive environment. The court must make specific factual findings and reasons consistent with best interests.

**Appeal:** The Family Court is a trial court. Any party has the right to appeal an adverse decision to the Appellate Division of the Supreme Court. The Appellate Division will normally affirm or reverse the decision of the Family Court. In rare instances, the decision of Appellate Division may be appealed to the New York Court of Appeals in Albany. If the Family Court directs the return of a child previously placed in out of home care, the order is automatically “stayed” until 5 p.m. the next business day unless DSS waives the stay.

**Consent Father:**

A biological father with full rights meaning he normally would have the right to care and custody of a child absent some other basis to limit his rights. If he is a consent father, to free the child for adoption, he would have to consent(surrender) or have his rights terminated involuntarily assuming there is a legal basis. It is key to discuss the father issue with your attorney when you have a case. There are also fathers of children born out of wedlock who have limited rights called NOTICE Fathers, and NO RIGHTS fathers.

As of December 30, 2022, NY State law expanded the rights of fathers of children who were born out of wedlock when the child is in out of home care through the Family Court. As a result, many who were considered “Notice Fathers” became Consent Fathers if they met certain criteria. These include filing with the **putative father** registry, having a pending paternity petition or has been identified as a parent by the other parent in a written, sworn statement. Consult with your attorney. The act was named the **Parental Equity Act**.

**Contempt:** A court finding that a party willfully failed to obey a court order. Such findings can lead to fines and/or imprisonment. **Summary contempt** means that based upon an action or a behavior done in the presence of the court, the court holds the person in contempt. An example might be showing disrespect for the court through words or actions. For example, use of an expletive in court, especially directed at the Judge, would place one perilously close to being held in contempt of court. Never mess with the power of the court.

**Certified Foster Home**

Children who are placed in foster homes are subject to standards set by state laws and regulations. Foster homes must comply with a home study, and prospective foster parents must be able to meet the child’s health and safety needs. Foster parents must also follow

criteria concerning physical condition, character, motivation, and willingness to cooperate with the agency or district in providing services and carrying out the permanency plan.

### **Approved Foster Home**

An approved emergency relative foster home is a home in which foster care is provided to a child placed with an authorized agency who is cared for 24 hours a day in a family home with a foster parent who is a relative as defined by the regulation. 18 NYCRR 443. is the section which deals with certified and approved foster care requirements and issues.

**Permanency Planning:** When a child is in out of home care, the goal is to reduce the time it takes children to achieve permanency. Usually, the initial goal is to return the child to the parent through “diligent efforts”. If that is not achieved, other plans must be implemented. It is always wise to engage in concurrent planning in case reunification is not achieved. The Family Court will review the Permanency Planning efforts and goal often when the case is in court. Permanency Planning starts from Day 1 when a child is removed. Be aware that in some rare instances, the agency may file a motion in court to rule that reasonable efforts to return the child to the parent are no longer required.

**Visitation:** Parents of children in foster care have a right to visit and to contact their child through phone calls and letters while he or she is in foster care, unless the Family Court makes a contrary order. Visiting can be supervised or unsupervised. A respondent shall be granted reasonable and regularly scheduled visitation unless the court finds that the child's life or health would be endangered thereby, but the court may order visitation under the supervision of an employee of a local social services department upon a finding that such supervised visitation is in the best interest of the child. Visitation can only be stopped by court order. Of course, if an emergency arises, visits can be terminated but then requires a court order for any restrictions thereafter.

## **HEARINGS and Related**

**Preliminary Hearings:** This hearing is conducted to determine temporary orders such as a remand, parole under supervision (release), temporary Order of Protection (TOP) or other temporary orders. A rare 1022 hearing is a pre-petition application for a court order, a 1027 hearing is after filing the petition, an optional 1028 hearing is conducted when a parent (or child's attorney) demands the return of a child who is remanded or when a parent challenges a stay away Order of Protection. This may be referred to as a **Remand hearing** if seeking a removal of the child(ren). The demand for 1028 hearing can occur any time.

**Arraignment:** As used in Family Court, this is the **initial appearance** of a respondent where the charges are read (or reading waived) and the respondent is informed of their rights in court including right to counsel, including assigned counsel if eligible. Often, this term is used (in my opinion wrongfully- it is what it is) at the first court appearance whether or not a respondent is present.

**Adjournment:** This is where the proceedings are put off to another date for any number of reasons (e.g., illness, prior engagement of attorneys, court calendar congestion, other hearings taking priority, case not ready for trial, report not complete, etc.).

**Conference:** A court can schedule a conference to possibly settle a case without a trial and/or to deal with pretrial discovery issues. The Judge's law assistant will usually preside at this off the record conference. This conference will usually only involve attorneys, but CPS should make sure that your attorney knows what the county wants, what the county would settle for, and what the county does NOT want.

**Discovery:** Even if there is no formal conference, since Child Protective cases are "civil proceedings", the parties to the court action engage in "discovery" which means they are entitled to certain information which the other side possesses. There is both formal and informal discovery. Mostly this means that the attorney(s) representing the parent(s) and children are allowed to see or get copies of redacted case records before a trial. Remember that ALL discovery requests must go through your attorney so issues relating to non-discoverable privileged communications and confidentiality can be addressed as well as any appropriate motions for a "protective order." Discovery is available for all court proceedings including Termination of Parental Rights (TPRs). Often cases are settled the day of the fact finding or sooner based upon informal conferencing among the attorneys with input from caseworkers and their supervisors.

**Fact Finding Hearing:** A trial held to determine whether the allegations of the petition are true and whether that would constitute abuse or neglect as defined by the Family Court Act. The trial can be avoided if there is a negotiated settlement, an "admission" or a consent finding usually referred to as a 1051-a consent finding. A finding is made as to each respondent and each child. A case can also be resolved by a negotiated Adjournment In Contemplation of Dismissal as to a party. If a respondent fails to appear in court or defaults, the case will still have to be proven. Some courts call this an "inquest" or a "default" hearing. If the court determines that CPS has not proven its case, it will "dismiss" the case which means the court cannot make any court orders. A court could dismiss as to one party and not the other. The court can dismiss certain allegations and make a finding as to others.

**FCA §1051(A) Consent:** The Respondent voluntarily, intelligently, and knowingly consented to the entry of an order of fact finding without admission, and the Petitioner, Child's attorney and all other parties having consented to the entry of such order of fact-finding as well as the Judge. You may see this if there is a concurrent criminal case since if a respondent verbally admits to certain acts, such may be usable in a criminal case unless an agreement is worked out with the DAs office. Sometimes it is said that under FCA 1051(a), the Respondent "neither

admits nor denies” the allegation(s) but consents to the entry of a fact finding order. Some courts refer to such plea a No Contest or Nolo Contendre, or a “Alford Plea”.

**Judicial Admissions:** FCA §1051 also governs admissions to the petition’s allegations or to some of the allegations when a respondent waives their right to a fact-finding hearing (trial). The court will usually address the respondent and may reiterate their rights, advise them of the outcomes as a result, likely ask if they are admitting voluntarily asking them to state what they did. If satisfied with the allocution, the court will enter a “finding”.

**Inquest:** If a respondent fails to appear in court after being served or the court finds that every reasonable effort has been made to effectuate service, the court may proceed to hear the case against the respondent without their presence and likely make a fact finding order. It is called an “Inquest” or a “default hearing.”

**Summary Judgement:** DSS may seek summary judgment by submitting evidence in admissible form that establishes a basis for a Family Court finding without a necessity of a contested trial. An example would be the respondent was convicted of a sexual offense or homicide and the victim was his child.

### **Terms Heard During a Trial or Hearing**

**Imminent Danger:** At a Preliminary Hearing, standard by which court decides if a child is to remain in the care and custody of a parent pending further court proceedings.

**Extraordinary Circumstances:** When a Judge decides custody between a parent and someone who is not a parent, he or she will consider if there are "extraordinary circumstances". If there are extraordinary circumstances, then the Judge will consider what is in the best interests of the child. (OCA definition). In a custody case between parents where no issue of abuse or neglect exists, the court standard is best interests of the child.

**Best Interests of the Child:** There is no standard definition of "best interest" of the child. In general, it refers to the factors that the Judge considers when deciding what will best serve the child and who is best suited to take care of the child. In New York, the "child's health and safety shall be the paramount concerns" when making a decision. (OCA definition)

**Reasonable and Prudent Parent:** Courts must evaluate parental behavior objectively: would a reasonable and prudent parent have so acted, or failed to act, under the circumstances then and there existing.

### **Example of the Order of a Fact Finding Hearing**



**Court Officer or Bailiff or Clerk “Calls the Case”:**

All participants enter the court room, the parties, and witnesses.

**“Note Your Appearance”:** Lawyers recite their names, address and who they represent. CPS and other parties will also state their names and affiliation or relationship to the case.

**Answering “Ready” for trial:** Verifying that the attorneys are ready to proceed to trial.

**Court Orders the Exclusion of Witnesses who will testify later from the Courtroom.** CPS caseworkers have a right to be present at all times as an agent for the Commissioner although some judges may wrongfully order the caseworker to be excluded which is contrary to their own NY evidence guide.

A court may not exclude from the courtroom:

- (b) when a party is not a natural person, an officer or employee of the party designated as its representative by its attorney; or
- (c) a person whose presence is shown by a party to be essential to the presentation of the party’s case.

Other witnesses will be excluded.

**Opening Statements:** Attorneys summarize and outline their case. Often waived.

**Call your Witness:**

**Evidence**

Proof legally presented at trial through witnesses, photographs, documents, exhibits, physical objects, videos, or other legal means to establish a particular fact, issue, or both.

**Sworn Testimony:** Oral statements given under oath at a trial or hearing. Knowingly lying could be a ground to a criminal charge of perjury.

**Witness:** One who has knowledge of events or relevant facts; one who testifies to what he/she has seen, heard, or otherwise observed.

At some family court hearings, hearsay is admissible. Hearsay is usually not admissible at a fact-finding hearing unless there is an exception to the rule. (See below)

**Expert Witness** - One whose testimony is sought due to specialized education, training, or experience. If qualified, the expert may venture opinions rather than solely information.

**Child Witness:** CPS usually tries to avoid having a child testify but it happens from time to time when necessary.

**Voir Dire:** in this context a mini hearing to determine if a child can give sworn testimony.

**“In Camera” Interview:** The judge speaks to the child out of the presence of the respondents. Discretionary on the part of the court.

The child who testifies is likely to be questioned by respondents attorneys.

### **Certified Records/Affidavits/Affirmations**

**Direct Examination:** Direct examination is the initial questioning of a witness, by the party who called them. Usually, CPS workers are directly examined by the DSS/County attorney.

**Cross Examination:** Respondent's attorneys ask questions seeking to challenge or undermine the witness's direct testimony or to bring out facts favorable to their client.

**AFC Examination:** Question the witness Cross like seeking to support their client's position.

**Judge's Questions:** A judge is likely to ask questions to clarify but the court should not assume the function or appearance advocating for either the petitioner or a respondent.

### **Possible Redirect Examination**

### **Possible Recross Examination**

### **Objections:**

Judge will rule:

**Sustained:** don't answer.

**Overruled:** You may answer if you can.

**"On the Record":** As a court of record, proceedings are recorded for various uses including appeals, reviewing testimony, etc. The "court reporter" has to take down every word which is part of the court proceeding. The judge or attorneys can also use the record for reviewing the testimony of a witness, etc. This is why it is important that only one person at a time speak and that you speak loud enough for everyone to hear you, especially the court reporter. Most courtrooms use mechanical recording of everyone's words.

**"Off the Record":** "Off the record" means that the court reporter, or machine, will not record what is said since the judge will allow such statements not to be part of the official court record. Often you will see attorneys engaging in a "bench conference", "side bar", or "chambers conference" to discuss issues relating to the case. Only the Judge can declare a discussion to be "off the record".

**Stipulations:** The parties can agree to specific facts without need to present further evidence at a hearing or a trial. For example, a respondent acknowledges their date of birth, address, etc.

**Prima Facie Motion:** After DSS has presented their direct case, a Respondent may move to dismiss a case claiming that DSS has not presented a prima facie case. Usually denied. a prima facie case in this context means that there is adequate evidence of petitioner's allegations so that it is reasonable for the court continue hearing the case.

**Respondents Case** (Each Respondent Gets to Present their case)

**Direct Exam**

**Cross Exam**

**AFC Exam**

**Judge's Questions**

**Etc.**

Note: If a respondent does not testify the court is likely to draw a **negative inference** against the respondent.

**AFC's Case**

**Direct Exam**

**Cross Exam**

**Judge's Questions**

**Etc.**

**Closing Arguments:** The attorneys sum up their case and make closing arguments in support of their positions.

**Finding or Dismissal:** If after a fact-finding hearing, the court rules the case not proven as to a respondent or even as to an individual child, the court will dismiss the case. (A court can also dismiss a Neglect case if it finds that court intervention is no longer needed. Not common since often court intervention often motivates any positive changes.)

**Stay:** If the Family Court issues a decision returning a child who was in care over the objections of DSS, unless waived such order is "stayed" until 5 p.m. the next business day so DSS can consider appealing the decision. If the decision is appealed, the Appellate Division will decide whether to grant a further stay to allow for the appeal to proceed. Even if the Appellate Division denies the stay, ACS could still appeal if warranted.

**Note: Burden of Proof**

The petitioner (CPS) has the "burden of proof" - i.e. The obligation to prove to the court what is alleged in the petition at a fact-finding hearing. At Preliminary hearings such as a 1027/1028 hearing, CPS would have to prove imminent danger, or need for a Temporary Order of Protection or an Order of Supervision.

**(Fair) Preponderance of the Evidence:** Evidentiary standard by which the child protective (Abuse/Neglect) case must be proven in court. Imagine the "scales of justice" with packages of "proof" being placed on either side by both parties. To "win" as "prosecutor" you need the "weight of the evidence" in your favor. "Fair Preponderance" is about 51% in your favor after the court has heard both sides. Please note that under the law

an allegation of “Aggravated Circumstances” abuse may be proven by “**Clear and Convincing**” evidence (see below) which will impact on a possible Termination of Parental Rights case.

**Continuance:** When a hearing has been started and the matter must be stopped and put off until a later time or date, a "continuance" is granted

**Settlements (Plea Bargaining) without a Trial**

As to each respondent and each child

Note: The Judge has the power to reject negotiated settlements

**FCA §1051(a) Consent:** The Respondent voluntarily, intelligently, and knowingly consented to the entry of an order of fact finding without admission, and the Petitioner, Child’s attorney and all other parties having consented to the entry of such order of fact-finding as well as the Judge. You may see this if there is a concurrent criminal case since if a respondent verbally admits to certain acts, such may be usable in a criminal case. Sometimes it is said that under 1051(a), the Respondent “neither admits nor denies” the allegation(s) but consents to the entry of a fact-finding order. Some courts refer to such plea a No Contest or *Nolo Contendere*, or a “Alford Plea”.

The court will likely find that a respondent “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, attorney for the child and all other parties having consented to the entry of such order of fact-finding as well.”

Although the respondent makes no admissions when s/he consents to a finding, s/he is aware that the consent would have “the same legal effect as if there had been a hearing and all the necessary facts (alleged in the petition) were proven. Cite omitted

**Judicial Admissions:** FCA §1051 also governs admissions to the petition’s allegations or to some of the allegations when a respondent waives their right to a fact-finding hearing (trial). The court will usually address the respondent and may reiterate their rights, advise them of the outcomes as a result, likely ask if they are admitting voluntarily asking them to state what they did. If satisfied with the allocution, the court will enter a “finding”. Sometimes an admission will be negotiated but coupled with an agreed upon disposition such as a Suspended Judgement. A respondent can admit to certain allegations (partial admission) and yet not admit to others. This negotiated settlement may be acceptable to DSS and the court.

**Allocution:** Before a respondent makes an admission or consents to a finding, the court will inform the respondent of their rights, and their

understanding of the consequences of a finding. FCA 1051(f) was recently amended to include the revised consequences of such an admission regarding the court's powers and the state central register reports. Failure to give the required notice "shall be vacated upon notice of any party." The Judge will likely ask the respondent to state in their own words what they did or failed to do or whether they consent to the finding "without admission". The plea may include a waiver of the right to appeal to a higher court as well as a waiver of the right to contest the allegations at a "fair hearing".

**Adjournment in Contemplation of Dismissal (ACD or ACOD):** Another way to negotiate a settlement of a case is for ALL the parties plus the Judge agree to Adjourn the Case for a Period of up to one year under certain specified terms and conditions. A Judge cannot order any party to consent to an ACD. The child normally remains with the parent in a type of probationary status under supervision of the agency. If things go well, and there is no violation of the conditions of the ACD, the case is dismissed without a fact-finding hearing or a determination of whether the child is abused or neglected. (Some courts have allowed post-fact finding ACD's. NYC does not do post fact finding ACDs although they are recognized on the official Court ACD form.) Normally, a child will be home under supervision during the period of the ACD. If an ACD is violated, a violation petition can be filed. If the court finds that there has been a violation of a pre fact finding ACD, the case reverts to pre fact finding status which can be problematic owing to stale allegations and possibly unavailable witnesses.

**Withdrawal** The agency petitioner may decide to withdraw a court case if it decides court intervention is no longer necessary or for other reasons. From the DSS point of view, it is preferable that the withdrawal is "without prejudice" meaning that if necessary, the allegations can be refiled whereas a withdrawal with prejudice cannot be renewed. Some courts believe they need to approve a withdrawal whereas some do not.

**Finding:** If all or some of the allegations are admitted to or proven as to a child and as to a respondent, the court will enter a finding of abuse, neglect, or severe abuse which means the court can issue a dispositional order.

**Summary Judgment Finding:** At times, the Court may grant a motion for summary judgment when there has been a criminal conviction on a concurrent case. For example, if a parent has been found guilty of the crime of Assault as to their child, the Family Court may make a finding based upon a Motion for Summary Judgment.

**Dismissal:** If after a fact-finding hearing, the court rules the case not proven as to a respondent or even as to an individual child, the court will dismiss the case. (A court can also dismiss a Neglect case if it finds that court intervention is no longer needed. Not common since often court intervention often motivates any positive changes.)

## **Basic Evidentiary Rules**

### **Material and Relevant Evidence**

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the proceeding more probable or less probable than it would be without the evidence. Evidence is only admissible at court hearings when it is pertinent to the issues before the court. Hearsay would be admissible at hearings other than a fact-finding hearing. The term “material evidence” is commonly used to mean evidence of a fact in issue or evidence probative of a fact in issue.

### **Material, Relevant, and Competent Evidence**

Not all evidence is admissible. The prejudicial effect may outweigh the probative value. The evidence may be based upon inadmissible hearsay at a fact-finding hearing. The evidence is an opinion which would only be admissible if stated by a qualified expert. The evidence can be relevant to your case but not admissible in court. In a criminal case, evidence can be excluded from a trial if it was obtained in violation of the law. The evidence is “suppressed.” For example, the evidence was obtained in an illegal search or in violation of someone's right to remain silent.

### **Hearsay Rule**

Hearsay testimony or evidence is NOT admissible at a fact-finding hearing UNLESS it comes in as an exception to the hearsay rule.

Definition of Hearsay

- (1) Hearsay is an out of court statement of a declarant offered in evidence to prove the truth of the matter asserted in the statement.
- (2) The declarant of the statement is a person who is not a witness at the proceeding, or if the declarant is a witness, the witness uttered the statement when the witness was not testifying in the proceeding.
- (3) A statement of the declarant may be written or oral, or non-verbal, provided the verbal or non-verbal conduct is intended as an assertion.

### **Hearsay Exceptions**

**Out of Court Statement of the Subject Child (unique to Art 10 proceedings by statute) See below.**

#### **Excited Utterance**

A statement about a startling or exciting event made by a participant in, or a person who personally observed, the event is admissible, irrespective of whether the declarant is available as a witness, provided the statement was made under the stress of nervous excitement resulting from the event and was not the product of studied reflection and possible fabrication. (example: child states to Emergency Medical Technician treating him for injuries that his mother just pushed him out the window). Another example, a victim of Domestic Violence calls 911 and minutes after the incident, speak to a police officer. She is very upset, crying and in distress. The statements are admissible as an excited utterance

since she was still under stress and not made under the impetus of studied reflection or possible fabrication.

The takeaway for CPS is ALWAYS attempt to use the actual words uttered as well as observing and documenting the demeanor of the speaker.

### **Present Sense Impression (from a 2022 Court of Appeals decision)**

The present sense impression exception to the hearsay rule applies to statements that are

- (1) made by a person perceiving the event as it is unfolding or immediately afterward and
- (2) corroborated by independent evidence establishing the reliability of the contents of the statement.
- (3) descriptions of events made by a person who is perceiving the event as it is unfolding” are “deemed reliable . . . because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory.

### **Business Record Rule (See below for FCA version under FCA 1046)**

**CPLR 4518. Business records.** (a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. **An electronic record**, as defined in section three hundred two of the state technology law, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.

### **Admissions of the Respondent**

(1) A statement of a party which is inconsistent with the party’s position in the proceeding is admissible against that party, if the statement is one of the following:

- (a) made by a party in an individual or representative capacity and offered against the party in that capacity, irrespective of the party’s lack of personal knowledge of the facts asserted by the party.
- (b) made by a person in a relationship of privity with the party and the statement concerns the party’s and the person’s joint interest.

(2) A statement offered against an opposing party shall not be excluded from evidence as hearsay if made by

- [a] a person whom the opposing party authorized to make a statement on the subject or



[b] by the opposing party's agent or employee on a matter within the scope of that relationship and during the existence of that relationship.

The required authorization may be expressly given by the party or implied from the scope of the agent's or employee's duties or employment. The statement cannot be used as proof of the agency or employment relationship, or the claimed authority to make the statement, or the scope of the agency or employment relationship, unless it is admissible under another exception.

**Admissions by Silence:** Example: Domestic Violence non-respondent victim states to CPS in front of the alleged perpetrator that he punched her in the face. The alleged perp hears the statement but remains silent. To use that person's silence or evasive response as evidence against the respondent, DSS must establish that the respondent actually heard and understood the assertion and reasonably would have been expected to deny it.

### **Statements Made for Purposes of Medical Diagnosis or Treatment**

1. A statement made by a declarant to a health care professional for purposes of medical treatment and diagnosis which describes medical history, or past or present symptoms, pain or sensations, or their general cause, and is germane to diagnosis or treatment is not excluded by the hearsay rule even though the declarant is available to testify.(example the Court of Appeals held a child's statement to a pediatrician concerning the cause of his injuries was admissible as it was relevant to treatment and diagnosis.) This exception to the hearsay rule is very important since while the out of court statement of a child regarding abuse or neglect requires corroboration for a finding as per FCA 1046, such statements to a treating therapist or a physician regarding treatment, diagnosis and discharge. are independently admissible(see 2025 NY Slip Op 03764) (see also 233 AD3d 481). This could also include child's statements contained in the medical records.

### **Prompt Outcry**

Evidence that the victim of a sexual assault promptly reported the matter to another person is admissible:

- (1) for the purpose of assessing the credibility of the complainant with respect to the commission of the offense; or
- (2) when relevant, and to the extent necessary, to explain the investigative process and complete the narrative of events leading to the defendant's arrest. Note This rule is derived from substantial Court of Appeals precedent holding that in a sex offense criminal prosecution, evidence that the victim of the crime reported the assault shortly after it occurred is admissible as bearing on his or her credibility, a non-truth purpose.

**Judicial Notice:** Without requiring proof, the Family Court can take judicial notice of the law, binding case law, common knowledge, and prior court records and orders. For example, a social worker is a mandated reporter, there was a previous

judicial finding of abuse as to a sibling, or the court previously issued an Order of Protection.

### **Some Special Evidentiary Rules**

**Derivative Abuse or Neglect (FCA §1046(a)(i)** Proof of the abuse or neglect of one child shall be admissible on the issue of the abuse or neglect of any other child of, or the legal responsibility of the respondent. This is a special statutory rule of evidence applicable to child abuse or neglect family court cases. In certain instances, a petition can be filed even though the child has never been with the parent based upon mental incapacity or a newborn whose sibling has been removed based upon abuse or neglect. It is possible that abused or neglected child was not in the immediate family of the respondent if arguably such actions are derivatively relevant to the respondent's own children.

**Res Ipsa Loquitur (FCA §1046(a)(ii)** A Latin phrase meaning "the thing speaks for itself". Under the Family Court Act evidentiary rules, the fact that a child has a condition or injury of such a nature as would ordinarily not be sustained or exist except by reason of acts or omission of the parent or other person legally responsible shall be prima facie evidence of child abuse or neglect. What this means is that the respondent must adequately explain the injury or condition to the satisfaction of the court. This is a special statutory rule of evidence applicable to child abuse or neglect family court cases. If a respondent does not testify, the court likely will draw a Negative Inference against that person. Adverse inferences against litigants asserting their Fifth Amendment rights or failure to testify in a Family Court civil proceeding is common.

**Misuse of Drugs, or Alcohol (FCA §1046(a) (iii) )**

(iii) proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child except that such drug, or alcoholic beverage misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program. Provided however, the sole fact that an individual consumes cannabis, without a separate finding that the child's physical mental or emotional condition was impaired or is in imminent danger of becoming impaired established by a fair preponderance of the evidence shall not be sufficient to establish prima facie evidence of neglect.

**Out of Court Statements of a Child: FCA §1046(a) (vi) :** previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, but if uncorroborated, such statements shall not be sufficient to make a

fact-finding of abuse or neglect. Any other evidence tending to support the reliability of the previous statements, including, but not limited to the types of evidence defined in this subdivision shall be sufficient corroboration. The testimony of the child shall not be necessary to make a fact-finding of abuse or neglect. The key issue is whether the “corroboration” suffices to support the child’s hearsay statement(s).

**Child Witness:** Despite the intent to spare the necessity of a child testifying, in some instances FCLS will need the child to testify when there is no corroboration of out of court statements. It is preferable that the child testify out of the presence of the respondent. Testimony given under oath is preferable but not necessarily essential.

**FCA §152.** In conducting a hearing under this act, a judge may dispense with the formality of placing a minor under oath before taking his testimony. The court will have to determine if the child is capable of giving sworn testimony.

**“Lincoln” Hearing:** The Family Court Judge conducts an interview with a child “in chambers” outside the presence of their parents or attorneys. Often the child’s attorney will be permitted to appear with the child. This hearing normally is to allow the Judge to inquire into the child’s wishes rather than attempting to prove certain allegations of abuse or neglect. (The name “Lincoln” comes from the Court of Appeals case “Lincoln v. Lincoln” which permitted such an interview in a custody case). A judge may wish to speak directly to a child in an article ten case. If it is testimony, defense lawyers can participate, including questioning the child unless they waive their appearance.

**State Central Register Reports (FCA §1046(a)(v):** A report of Suspected Child Abuse or Maltreatment from a mandated reporter filed with the NY State Central Register(SCR) is admissible in evidence at a fact-finding hearing. Reports from non mandated reporters will be admissible at other hearings. Judges will decide how much weight will be given such “Oral Report Transmittal” a/k/a an “ORT”. This form is also known as a “2221” or “2221a.” or an “Intake Report”.

**Mandated Reporters:** Required to report suspected child abuse or maltreatment to the State Central Register when they have reasonable cause suspect child abuse or maltreatment. Failure to report could lead to criminal and civil liability (SSL §420). Reporters who make reports in good faith have immunity from liability (SSL§ 419). CPS cannot disclose the identity or identifying information of any source with a few exceptions owing to confidentiality laws.

**Business Record Rule: FCA §1046( iv)** any writing, record or photograph, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any condition, act, transaction, occurrence or event relating to a child in an abuse or neglect proceeding of any **hospital** or any other **public or private agency** shall be admissible in evidence in proof of that condition, act, transaction, occurrence or event, if the judge

finds that it was made in the regular course of the business of any hospital, or any other public or private agency and that it was in the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. Other business records may be admissible if such record conforms to the Business Record rule set for in the NY Civil Practice Law and Rules, Rule 4518.

**CONNECTIONS** is the child welfare computer system that allows for documentation of the delivery of child welfare services to families and children in New York State.

**NY State Technology Law§ 306.**

In any legal proceeding where the provisions of the civil practice law and rules are applicable, an electronic record or electronic signature may be admitted into evidence pursuant to the provisions of CPLR 45 and CPLR 4539

**CPLR 4539 (b)** A reproduction created by any process which stores an image of any writing, entry, print or representation and which does not permit additions, deletions, or changes without leaving a record of such additions, deletions, or changes, when authenticated by competent testimony or affidavit/affirmation which shall include the manner or method by which tampering or degradation of the reproduction is prevented, shall be admissible in evidence as the original.

**Privileged Communications:** Certain communications between professionals and patients or clients are privileged meaning they are protected from being disclosed under the law. These include Physician/ Patient, Psychologist/Client, Social Worker/Client, Rape Crisis Counselor/Client. Additionally Spousal Communications are privileged. Under the Family Court special rules of evidence, these privileges are not a basis to exclude evidence. However, Clergy/Penitent and Attorney/Client privileges still apply.

**If the Court Enters a “finding” after a trial or Settlement**

**I&R (Investigation and Report):** A post-fact-finding report ordered by the court. The assigned worker does an investigation into the background of the child and its parents. A recommendation is made to the court as to what the court should do in its Dispositional Order to ensure that the child's needs are properly met.

**MHS/FET (Mental Health Study or “forensics”)** After a fact finding, the court may order a psychiatric and/or psychological examination of the child and/or parents. The resulting reports are prepared for the court's use in entering the "proper" dispositional order. The court is not bound by the recommendations made in either the I&R or MHS, but normally they carry great weight.

**Dispositional Alternatives**

**Suspended Judgment (FCA §1053):** The Court may enter a suspended judgment with certain terms and conditions for a period of up to one year renewable for another year upon a finding of “exceptional circumstances”. The child should not be in out of home care. This result is favorable to a respondent since if there no violation, the case is “dismissed”

and the underlying State Central Register allegation is NOW marked unfounded and sealed. The court can impose a Suspended Judgment without the consent of DSS and/or the AFC. If a Suspended Judgment is found to be violated, the court may enter any dispositional order it could have previously made.

**Placement (FCA §1055)**: Placement (direct or foster care) of a child could be ordered or continued until the next Permanency Hearing. If the child is not "placed", normally s/he will be "**released to respondent parent** under supervision"(FCA §1057) or "**released to non-respondent** parent under supervision"(FCA §1054).(see below for issues related to a 1054 order) There are other dispositions the court can enter, such as a "suspended judgment" (FCA§ 1053) or a "final order of protection." (FCA§ 1056). If a separate application is made and granted, the court may grant Article 6 Custody or Guardianship to a respondent parent, non-respondent parent, relative or other suitable person who has filed a separate petition. If the court grants custody or guardianship at a dispositional hearing or a Permanency Hearing, CPS Article 10 court involvement ceases.

**Adjournment in Contemplation of Dismissal (ACD or ACOD )**: A court order entered on consent of DSS, respondent, and child's attorney whereby the child normally remains with the parent in a type of probationary status under supervision under specific terms and conditions. If things go well, and there is no violation of the conditions of the ACD, the case is dismissed without a fact-finding hearing or a determination of whether the child is abused or neglected. (Some courts have allowed post-fact finding ACD's. NYC does not do post fact finding ACDs although they are recognized on the official Court ACD form.) Normally, a child will be home under supervision during the period of the ACD. Failure to comply with the terms and conditions of an ACD can lead to a Violation petition. If the court finds that there has been a violation of a pre fact finding ACD, the case reverts to pre fact finding status which can be problematic owing to stale allegations and possibly unavailable witnesses. This is why it is preferable to grant an ACD after an admission. A court cannot order a case to be ACDeD over the objections of any party.

**Court Ordered Supervision (C.O.S.)(FCA §1057 release to respondent under supervision)** : The Family Court has the power to place a respondent parent or caretaker under "Court Ordered Supervision" usually with specific terms and conditions. Should there be a violation of such terms and conditions of the court order, your attorneys must be contacted so that an appropriate remedy could be sought from the court. Likewise, if the supervising agency fails to follow a court order directing supervision, it too may be subject to court sanctions or a contempt citation. If supervision order is violated, a violation petition can be filed. If the court finds a violation, it can do whatever it could previously do at Disposition. Technically, a person who violates a supervision order can be sentenced to jail (FCA §1072). If CPS is seeking a jail sentence, the case must be proven beyond a reasonable doubt.

**PRE-FEBRUARY 5, 2025**

**Release to a Non-Respondent Parent (FCA §1054)**:

The child is released to this non respondent parent for a period of one year which may be extended once. The court may require the non-respondent to submit to the jurisdiction of the court. While it is not called supervision, it sure looks like it. The court gets around the jurisdictional issues by requiring a non-respondent to consent, albeit arguably coerced. The authority of a court to order supervision of a non-respondent is questionable and is being challenged on appeal.(See below) While the Family Court Act §1054 itself does not reference “supervision”<sup>1</sup>, the Family Court Rules does so under 22 NYCRR 205.83.

(b) An order pursuant to **section 1054** of the Family Court Act placing the person to whose custody the child is **released under the supervision** of a child protective agency, social services officer or duly authorized agency, or an order pursuant to section 1057 placing the respondent under the supervision of a child protective agency, social services official or authorized agency, shall contain at least one of the following terms and conditions requiring the respondent to:

- (1) observe any of the terms and conditions set forth in subdivision (a) of this section.
- (2) cooperate with the **supervising agency** in remedying specified acts or omissions found at the fact-finding hearing to constitute or to have caused the neglect or abuse.
- (3) meet with the **supervising agency** alone and with the child when directed to do so by that agency.
- (4) report to the **supervising agency** when directed to do so by that agency.
- (5) cooperate with the **supervising agency** in arranging for and allowing visitation in the home or other place.
- (6) notify the **supervising agency** immediately of any change of residence or employment of the respondent or of the child; or

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<sup>1</sup>FCA 1054 (a) An order of disposition may release the child for a designated period of up to one year to a non-respondent parent or parents or a person or persons who had been the child's legal custodian or guardian at the time of the filing of the petition, and who is not or are not respondents in the proceeding under this article. An order under this section may be extended upon a hearing for a period of up to one year for good cause.

(b) The court may require the person or persons to whom the child is released under this section to submit to the jurisdiction of the court with respect to the child for the period of the disposition or an extension thereof. The order may include, but is not 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. The order shall set forth the terms and conditions applicable to such non-respondent and child protective agency, social services official and duly authorized agency with respect to the child.

(c) In conjunction with an order releasing the child to a non-respondent parent, legal custodian or guardian under this subdivision, the court may also issue any or all of the following orders: an order of supervision of a respondent parent under [section one thousand fifty-seven](#), an order directing that services be provided to the respondent parent under [section one thousand fifteen-a](#) or an order of protection under [section one thousand fifty-six](#) of this article. An order of supervision of the respondent entered under this subdivision may be extended upon a hearing for a period of up to one year for good cause.

(d) Except as provided for herein, in any order issued pursuant to this section, the court may require the child protective agency to make progress reports to the court, the parties, and the child's attorney on the implementation of such order. Where the order of disposition is issued upon the consent of the parties and the child's attorney, such agency shall report to the court, the parties and the child's attorney no later than ninety days after the issuance of the order and no later than sixty days prior to the expiration of the order, unless the court determines that the facts and circumstances of the case do not require such report to be made.

(7) do or refrain from doing any other specified act of omission or commission that, in the judgment of the court, is necessary to protect the child from injury or mistreatment and to help safeguard the physical, mental, and emotional well-being of the child.

The official court form reads as follows:

**“ORDERED** that, during the period of release, the non-respondent parent or legal 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....”

NOTE: The official position of OCFS is that the Family Court cannot order supervision of a non respondent as outlined in 17 OCFS ADM 02 as amended in February 2023. “The court may not place a non-respondent person to whom the child is released under supervision”. (Two Family Court decisions take the same position). “However, the court may order that any such person to whom the child is released must submit to the jurisdiction of the court with respect to the child, which may include requirements that the child be made available for visits with the respondent, siblings, and others, and for appointments and visits by the child protective agency or other social service agencies, the child’s attorney, and clinicians”. The language in FCA 1054 that a court may “require the respondent to submit to the jurisdiction of the court” seems inconsistent and maybe unconstitutional. Likely this will be clarified either by Appellate courts or legislative actions. (Of course, it may be the better choice for the non respondent parent to file for Article Six custody which is gets rid of supervision and is for more than a year, is more permanent, and includes power to make medical and other decisions.

#### **AFTER FEBRUARY 5, 2025**

Please Note that on February 5, 2025, the Appellate Division Second Dept. decided that the Family Court may NOT place a Non-Respondent custodial parent under the supervision of ACS and the court and direct the parent to cooperate with ACS in various ways, in circumstances where the respondent parent resides elsewhere and the child has not been removed from the non- respondent’s home. The court cited the lack of any statutory authority permitting the challenged directives in concluding that the Family Court improperly placed the mother under the supervision of ACS and the court and directed her to cooperate with ACS in certain respects.

MATTER OF SAPPHIRE W, (ACS V. KENNETH L). \_\_AD3d \_\_ (2<sup>ND</sup> DEPT. 2025) 2025 N.Y.Slip Op 00662, 2025 N.Y. App Div LEXIS 695, 2025 WL 395816

Questions presented mostly for CPS attorneys and the court:

Does this case only apply when there is a non-respondent with custody and the child has never been removed?

What if the child was removed and returned by the court or CPS since the case seems to turn on the fact that the child was never removed from that parent?

What if the non-charged non-respondent parent, who can be a non-respondent “party”, decides not to appear in court in response to the Notice of Pendency therefore rejecting that status? The court does not seem to have any power to make that parent appear since there is no *in personam* jurisdiction.

What if that parent appears only for the limited purposes of producing the children for the Attorney for the Children and/or for an Order of Protection for the custodian parent and/or the children? What exactly is the responsibility of CPS regarding the respondent within the Article Ten. Does the court have any authority to make order as to the children who are in the custody of the custodial parent where the court has no ability or authority to make orders. In such cases, should CPS just file the case as to the respondent, obtain an Order of Protection for the child(ren) and/or custodial parent and any Supervision order will be towards what end? (“It seems that my work is done here.”) Again, seems that any visitation order as to the custodial parent would have to be within the framework of an Article Six case.

The SAPPHIRE W case seems to limit the ability of the Family Court to protect children.

A question arises since this case was decided by the 2<sup>nd</sup> Dept App Div. is it binding on CPS and the Family Court in the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Dept?

Since the issue has never been decided by an Appellate Court in New York, it is binding authority for all the Family Courts in those departments at least until there is a contrary decision from the 1<sup>st</sup>, 3<sup>rd</sup>, or 4<sup>th</sup> Dept or the NY Court of Appeals. *Mountain View Coach Lines v Storms*, 102 AD2d 663, 476 NYS2d 918(2<sup>nd</sup> Dept. 1984)

**Order of Protection (O/P):** The court has the power to issue an Order of Protection against someone prohibiting certain conduct or affirmatively ordering such person to abide by certain terms and conditions. Willful violation of the Order of Protection exposes the wrongdoer to up to six months in jail for each offense and possibly longer if there exist aggravating circumstances. (If CPS is seeking a jail sentence, the case must be proven “beyond a reasonable doubt” since it impacts on a person’s liberty interests.) The court may issue an Orders of Protection against respondents, family members, or on behalf of persons who are presently or formerly had an intimate relationship. Orders of protection against family members can be for up to one year subject to extension. Non-family members can have an OP or up to the child’s 18<sup>th</sup> birthday. Family Courts and Criminal Courts issues Orders of Protection of various lengths in other proceedings. Orders of Protection running from one court date to another are called **Temporary Orders of Protection (TOP)** whereas an Order of Protection issued at Disposition is called a Final Order of Protection. (FOP). If CPS goes forward with charging a violation of an O/P, any possible criminal charges will be precluded since such would violate the Constitutional prohibition against “**Double Jeopardy.**”

### **Article Six Custody or Guardianship**



### **If a Relative files Article Six Petition**

If a relative files for article six custody or guardianship, the court can hold a consolidated dispositional and article Six hearing. If the court grants Article six custody or guardianship, the child has achieved “permanency.” The court can no longer issue orders against the child welfare agency. If the court grants guardianship to a relative or suitable person under the separate docket that also terminates the jurisdiction of this Court over the article ten proceeding.

**The “Loaded Six”:** The court will likely order that the DSS and the attorney for the child(ren) shall be notified and shall be made parties to any subsequent proceedings for modification, enforcement or termination of the Order granted on such Docket number. The term “loaded six” is a slang term unofficially used mostly by attorneys.

### **Respondent Parent or Non Respondent parent Filed Article Six Custody**

A respondent parent or a non-respondent parent may also file for custody under Article Six. If the court grants custody to the respondent or non-respondent parent, it terminates the jurisdiction of Family Court over the Article Ten proceeding.

These outcomes can also occur as a result of a permanency hearing. See below.

### **Later Court Proceedings**

**Permanency Hearings:** (FCA §10-A) A hearing for the purpose of reviewing the foster care or direct placement status of the child and the appropriateness of the permanency plan developed by the social services official on behalf of such child. "Permanency hearing report" shall mean a **sworn report** submitted by the social services district to the court and the parties prior to each permanency hearing regarding the health and well-being of the child, the reasonable/diligent efforts that have been made since the last hearing to promote permanency for the child, and the recommended permanency plan for the child. The permanency hearings are held periodically roughly every six months on an Article Ten case. A parent may contest the need for continued placement at this hearing. Permanency Hearings continue until a child reaches permanency including where a child has been freed for adoption.

See above for the possible Article Six outcomes rather than extending the placement which would also terminate the Courts jurisdiction.

### **Hearing on a Motion to hold a Party in Contempt for Violation of a Court Order**

Courts can hear proceedings for alleged violations of supervision, orders of protection, ACDs, contempt of Court, etc. If proven, the court can enforce a remedy. Court orders may also be enforced against CPS/DSS. Note that if the court finds after a hearing that the 1057 Supervised Release to a Respondent or an Order of Protection has been violated, it

may impose a jail term under FCA §1072. Note: FCA 1072 also applies to FCA 1054 Releases Under Supervision to a Non-Respondent which would also subject that person to a jail term. However, this is highly questionable under the *Sapphire W* decision(see above) since supervised release to a non-respondent at a dispositional hearing may not be a valid order. Also, OCFS holds that such order is invalid. We likely will have to wait further court clarification or legislative statutory clarifications.

**Hearing on a Motion to Modify, Stay, or Set Aside a Court Order:** A motion may be made to seek a change in a court order. The court can also change the order on its own.

**Termination of Parental Rights Case (T.P.R.):** A separate court proceeding under Social Services Law §384-b whereby an agency seeks to terminate the legal rights of a parent as to a child in care. This can also be referred to as “freeing the child for adoption” meaning that a parent no longer has the rights to consent or not consent to an adoption. The care, custody, and guardianship is committed to the authorized agency who may now consent to the adoption by a specific resource. Alternatively, a parent may wish to “surrender” their rights by signing a “Surrender”. There are six bases to involuntarily terminate parental rights in NY State, the most common basis would be Permanent Neglect. (Other grounds are abandonment, mental illness (impacting on ability to care), Intellectual disability (impacting on ability to care), severe abuse or repeated abuse.)

**Dale P. Case**

This NY Court of Appeals case authorized the filing of a TPR case when a child is NOT in the care and custody of the Commissioner of Social Services or agency but is in a direct placement with a relative or suitable person. Cases in direct placement still have court Permanency Hearing reviews whereby the agency still must oversee the goal of achieving permanency for the child. If a child is in direct placement with a relative, that case is exempt from “the must file a TPR” law.

**“Clear and Convincing” evidence:** Standard by which Termination of Parental Rights proceedings must be proven (about 66%) or abuse or neglect cases involving children subject to the Indian Child Welfare Act. It has nothing to do with the number of witnesses called in favor of each party. Be aware that under the law, a severe abuse case (called “aggravated abuse”) may be proven by “clear and convincing evidence” at the Abuse Fact finding which is admissible at any subsequent Termination of Parental Rights case involving the child and may result in a Summary Judgement meaning no trial is necessary owing to the previously decided case.

**Voluntary Placement Agreement: (Social Services Law §384-A)** An agreement whereby a child is placed with an agency on consent of a parent. The agreement spells out the terms and conditions of the placement and the obligations and responsibilities of the parent and the agency. This document and the circumstances involved with its execution are reviewed by the Family Court at a “SSL §358-a” proceeding which must include the ASFA determinations of “reasonable efforts” and remaining home being “contrary to the health

and safety” of the child. After the initial review Voluntary Placements are subject to Permanency Hearings under FCA §10-a just like an Article Ten placed child. If there is provable Abuse or Neglect, the Court will not approve a voluntary placement agreement.

**Surrender:** A parent may wish to relinquish their parent rights by agreement “surrendering” the child to the care, custody, and guardianship of the Commissioner. There are “**judicial surrenders**” which are signed before a Judge who advises the parent of their rights and “**extra-judicial surrenders**” which are signed out of court, and which must later be reviewed by the court. Once a surrender is signed, it cannot be revoked. A Parent can retain some rights to contact if they sign a negotiated “conditional surrender”. Conditions are enforceable by court action. Often a TPR will be settled through a negotiated conditional surrender whereby a biological parent can retain enforceable certain rights as to the adopted child.

**Agency Adoption:** A court proceeding whereby the freed child is adopted by other couples or single people or who obtain full parental rights which could include a new name, birth certificate and parental responsibilities. An adoption proceeding usually takes place in Family Court or the Surrogate’s Court.

### **Standards of Proof**

**“Fair Preponderance of the Evidence”(see above)**

**“Clear and Convincing Evidence” (see above)**

**“Beyond a Reasonable Doubt”** Standard by which a criminal case must be proven for there to be a conviction. If a person has been convicted in a criminal case regarding his/her child, it likely will impact on the concurrent Family Court case either through a motion for “summary judgment” in the Article Ten case or in certain instances will require the child welfare agency to file a Termination of Parental Rights petition. (Additionally, if you have a case involving a child subject to the Indian Child Welfare Act, you will have to prove your TPR case “beyond a reasonable doubt” to prevail.) JD and PINS petitions also have to be proven by this standard.

**“Some Credible Evidence”:** Former standard by which a child protective worker determines if a report of suspected child abuse or maltreatment is “indicated.” As of January 1, 2022, the standard became **fair preponderance** to “indicate” a report or certain allegations. The subject may challenge such determinations through administrative hearings (Administrative Reviews and Fair Hearings) and eventually in court since such a finding may impact upon the ability of the subject to work with children or to become a foster or adoptive parent. Such a report will remain the data base until the youngest child named in the report is 28 years old!!!! However, an indicated report of neglect will only be available to potential employers and agencies for 8 years as of January 1, 2022. (For the information to be shared with potential employers or foster care agencies, such indicated

reports must reach the “preponderance of the evidence” threshold as per Federal Court rulings).

**“Reasonable Cause to Suspect”**- standard by which a mandated reporter of child abuse or maltreatment must report child abuse and/or maltreatment to the New York State Central Register. The failure to report can have criminal and civil legal consequences. A person who makes a report in good faith has state criminal and civil immunity.

## **OTHER ENTITIES**

### **NY STATE OFFICE OF CHILDREN AND FAMILY SERVICES (OCFS)**

The New York State agency which among other responsibilities oversees child welfare involvement in New York State including local county DSS’s. They issue Regulations within title 18 New York Codes, Rules and Regulations as well as Administrative Directives binding on localities, Local Commissioner’s Memos, State Policies, etc. NY city policies may not conflict with NY state laws, rules, regulations, and directives. The OCFS website has many excellent resources especially the NY State Child Protective Services Manual. Of course, CPS workers always conform to your County’s directions and policies.

### **NY STATE OFFICE OF COURT ADMINISTRATION**

The Administrative Arm of the New York State Court System under the direction of the Chief Administrative Judge. OCA issues court forms as well as rules and regulations governing the various courts including Family Court Rules. Official Court Forms are available at the OCA website. You can simply access family court forms by googling “New York family court forms.”

**Voluntary Agencies (a/k/a Contract Agencies)**: In a few counties a remanded or placed child will most likely be placed with a Foster Care agency which will be responsible for case planning for the child and family. The agency will provide sworn reports at the Permanency Hearings as well as negotiating surrenders and pursuing TPRs when appropriate.

## **NY State Courts**

### **New York Court of Appeals**

This is our highest state court which sits in Albany. The Judges are selected by the Governor to ten-year terms. Normally, a seven Judge panel reviews cases and decisions from the lower courts, reviews transcripts, appellate briefs and hears oral arguments. The Court of Appeals will issue a decision affirming or reversing previous decisions. They could issue a decision interpreting laws which then becomes binding precedent in New York. Appeals from the NY Court of Appeals on constitutional issues go to the United States Supreme Court in Washington, DC.

### **Appellate Division of the Supreme Court**

In NYC, appeals from the Family Court go to the Appellate Division 1<sup>st</sup> Dept for cases from the Bronx or NY County. Appeals from Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Rockland, Orange, Putnam and Dutchess Counties go to the 2<sup>nd</sup> Dept in Brooklyn. (The 3<sup>rd</sup> Dept is located in Albany. The 4<sup>th</sup> Dept is located in Rochester.) Normally, a five Judge panel will review the minutes of a case as well as evidence presented, the lower court decision, memos of law, briefs, and oral arguments or submissions. The AD will either affirm or reverse a decision or send the case back to Family Court for further proceedings. Their decisions are binding on the parties. A case decision will sometimes be appealed to the NY Court of Appeals.

### **Trial Courts**

**Family Court**

**Surrogate's Court**

**Supreme Court**

**Criminal Court**

**Civil Court**

**NY Court of Claims**

**County Court,**

**Local District Courts (Nassau and Suffolk)**

**Town and Village courts etc.**

### **Federal Courts**

#### **United States Supreme Court**

The highest court in the United States. Nine (9) Judges have lifetime terms, and they are selected by the President with the Advice and Consent of the Senate. They are not required to hear all cases, and they select which ones they decide to review. Their decisions interpreting the Constitution, United States and state laws and regulations, common law, or other issues are binding precedents for lower courts, States, and litigants.

#### **United States Court of Appeals for the 2<sup>nd</sup> Circuit**

This Federal Court has issued many important child welfare issues involving New York interpreting the Constitution and Due Process requirements. They hear appeals from the federal district courts. Decisions from the 2<sup>nd</sup> Circuit are binding precedents for the covered counties. Appeals go to the US Supreme Court which may or may not grant review. It is one of Thirteen (13) United States Courts of Appeal.

#### **United States District Courts**

This court has jurisdiction over cases where the law at issue is a federal law, cases involving the US Constitution and cases where the US government is a party to the litigation. Often NYC will be sued in a Section 1983 civil rights action for allegedly violating someone's constitutional rights. Federal Judges are selected by the President of the United States. Decisions from this court are binding on the litigants but may not be binding precedent for others should a similar issue arise.

This is a trial court. This court also have jurisdiction over federal criminal cases. Appeals go to the 2<sup>nd</sup> Circuit Court of Appeals.

**United States District Eastern District** covers Kings, Nassau, Queens, Richmond, and Suffolk

**United States District Southern District** covers New York, Bronx, Westchester, Rockland, Putnam, Orange, Dutchess, and Sullivan

**United States District Court (Northern District)**

Covers the following Counties: Albany, Broome, Cayuga, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, Rensselaer, Saratoga, Schenectady, Schoharie, St. Lawrence, Tioga, Tompkins, Ulster, Warren, and Washington.

**United States District Court (Western District)**

Covers the following Counties: Erie, Genesee, Niagara, Orleans, Wyoming, Chautauqua, Cattaraugus, Allegany, Livingston, Monroe, Ontario, Seneca, Wayne, Yates, Steuben, Schuyler and Chemung.

There are other specialized Federal Courts as well as other specialized state courts.

### **FAMILY COURT ACT SECTIONS OFTEN RECITED IN COURT**

**FCA §1012-** Sets forth the Family Court definitions of Abuse and Neglect.

**FCA 1015-a-** The Judge may order social services to provide or arrange for services for the child or family to facilitate the protection of the child. Not that if the court dismisses a case, the court loses jurisdiction to order services. Violation of such order subjects the Commissioner to a contempt citation.

**FCA §1017-** A section in which the court orders DSS to seek a non-respondent parent or placement resources and/or places a child directly with a relative, or suitable person, or with DSS. There likely will be an order for a Diligent Search and Investigation. DSS would be required to inform potential resources of their options to care for a child if they are qualified. Other Family Court Act sections can be involved in the placement order.

**FCA §1021-** Consent removal sections.

**FCA §1022-** Pre-Petition removal application or when seeking other pre-petition orders.

**FCA §1024-** Emergency Removal of a child without a court order section.

**FCA §1027-** Post petition applications seeking removal approval or other temporary orders.

**FCA §1028-** A demand by a parent for the return of a child on court remand status. The hearing must be conducted within three court days. The standard is imminent danger unless

there already has been a fact-finding determination. A parent excluded from a home on an Order of Protection may also demand a 1028 hearing to challenge the court order.

**FCA §1029-** Temporary Order of Protection pre-petition usually for up to 10 days.

**FCA §1034 (1)** Order directly CPS to conduct a child protective investigation on any case before the court and to report the results. It should not be a best interest's investigation, but the courts often misuse this section to involve DSS on custody matters.

**FCA §1034(2)-** DSS seeking a court order to gain pre-petition access to a child and/or a home for investigatory purposes. DSS must prove that it has probable cause or reasonable cause to satisfy the 4<sup>th</sup> Amendment's requirements. This application can be made when the court is in sessions or by phone when the court is not in session.

**FCA §1039-** An Adjournment in Contemplation of Dismissal where all the parties and Judge agrees. See above for more details. The Judge cannot order an ACD. An ACD can be agreed upon even in the middle of a trial.

**FCA §1039-b Motion.** "A No Reasonable Efforts Motion." When a child is in care DSS or direct placement, the agency can ask the Family Court to relieve it of the requirement to undertake Reasonable Efforts to Reunite the child with the parent(s). The law sets forth certain criteria for this application to be made. It is up to the Judge to decide whether to grant the application. (Also covered by FCA §1052)

**FCA §1046.** The section which defines the special evidence rules unique to Child Protective Proceedings and other definitions. For example, the out of court statement of a child relating to abuse or neglect is admissible at fact finding even if it is hearsay. However, that standing alone will need some other evidence to "corroborate" the statement for the court to make a "finding".

**FCA §1051.** Section whereby the court decides a fact-finding hearing. The case can be resolved by a Judicial Admission admitting some or all the allegations of a petition or a lesser negotiated settlement. For example, parent admits to excessive corporal punishment constituting neglect rather than abuse.

**FCA §1051(a) Admission.** (a/k/a consent finding) Sometimes this is referred to as Nolo Contendere or consent to jurisdiction. **Nolo contendere** is a legal term that comes from the Latin phrase for "I do not wish to contend". It is also referred to as a plea of "**no contest**". You may see this if there is a concurrent criminal case pending. Sometimes such would be referred to as an "Alford Plea." Defense attorneys believe this to be a better deal than making an admission whereby the respondent states on the record about waiving their rights to a trial and stating on the record the details of their neglect or abuse. Frankly, the law in this area is not so clear. Can the underlying allegations in the petition be used in the future or will attorneys argue that their client did not admit anything? Seems to fly in the face of **FCA §1051(f)** but that is for attorneys and the courts to argue about.

**FCA §255 Order:** FCA §255 authorizes the Family Court to order any state, county municipal and school district officer and employee to render such assistance and cooperation as shall be within his legal authority, as may be required to further the objects of this act. However, Section 255 does not permit the Family Court to invade the discretionary authority of the state agency authorized to provide appropriate care for a child in its custody (see Matter of Lorie C., 49 NY2d 161[1980]). Some Judges believe that they have the authority to order the Commissioner to do certain things such as buy a violin for a child, transfer a child to a different school, pay for a computer, etc. Despite whatever good intentions a Judge may have, agencies can only spend money or do things they are authorized to do under the law. For example, a Judge cannot order DSS to certify someone as a foster parent although it has been tried. One Judge ordered a foster care agency to present all their cases to her so that the Judge can review their handling. Reversed on Appeal. The Family Court is not empowered to do that. The Family Court is a court of limited jurisdiction.

**ARTICLE 6:** (“V” docket) A custody petition filed whereby one party is seeking custody of a child based upon proper standing and “best interests”. “Standing” is a legal term which determines whether the party bringing the lawsuit has the right to do so. For example, a stranger cannot seek custody of your children because they might be able to do a better job though one may enjoy the break.

**KinGAP: (Kinship Guardianship Assistance Payments)** (SSL§ 458) A court with the agreement of the child welfare agency involved can grant a petition granting Kinship Guardian to a relative who was previously a foster parent through DSS or an agency. Foster care type monies will be continued until the child’s 21<sup>st</sup> birthday. There will be no more Permanency Hearings since the child will have permanency. However, as with all custody and guardianship cases a bio parent can seek visitation or later seek to change the order based upon change of circumstances and best interests of the child.

**ARTICLE 8:** A Family Offense Case. Usually, a Domestic Violence case whereby the petitioner is seeking an Order of Protection against a respondent. There must be some type of familial or intimate relationship for a Petitioner to have standing to file. The alternative is to file a criminal case in the local criminal court.

**ICWA: The Indian Child Welfare Act (ICWA) of 1978** is a federal law that governs the removal and out-of-home placement of American Indian children. If a child is eligible for membership in a federal or state recognized tribe, the child welfare case will be subject to the mandates of ICWA. The ICWA was introduced in 1978 in response to the staggering amount of Native American children taken out of their homes and placed with adoptive families, foster care or in institutions. An important ICWA case is awaiting decision from the US Supreme Court. The case was argued in November 2022. The lawsuit argues that the Indian Child Welfare Act (ICWA) is discriminatory against non-Indigenous people and therefore, in violation of the Fourteenth Amendment. On June 15, 2023, the United States Supreme Court in a 7-2 decision upheld the constitutionality of ICWA. It is important for



caseworkers to try to determine if ICWA applies to the child welfare intervention. ICWA is addressed as follows in a Child Protective petition:

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]:

**MEPA: The Multiethnic Placement Act:** MEPA prohibits these agencies and entities from delaying or denying a child's foster care or adoptive placement based on the child's or the prospective parent's race, color, or national origin. The follow up Interethnic Placement Act modified and clarified aspects of MEPA.

**ICPC: The Interstate Compact on the Placement of Children (ICPC)** allows agencies to place children with foster parents or programs in other states. The New York State Office of Children and Family Services (OCFS) enforces the ICPC. Agents and agencies that conduct interstate adoptions or fostering must comply. Recently the NY Court of Appeals ruled that it does not apply when the child is released to an out of state parent. Agents must provide casework information to place a child in another state. Services in the receiving state must agree that the placement serves the child's interests.

**The Family First Prevention Services Act (Family First)**, enacted in February 2018, created a federal entitlement with the stated purpose of reducing and preventing entry into foster care. Family First allows states and tribes to use federal Title IV-E funds for prevention services that support children living safely with their families.

**Qualified Residential Treatment Program:** The Family Court must determine whether the needs of the removed child can be met through placement in a foster family home and, if not, whether placement of the child in a qualified residential treatment program provides the most effective and appropriate level of care for the child in the least restrictive environment and whether that placement is consistent with the short-term and long-term goals for the child, as specified in the child's permanency plan.

**Title IV-E:** It provides for federal reimbursement for a portion of the maintenance and administrative costs of foster care for children who meet specified federal eligibility requirements. In New York, the federal share is 50%. The federal funds help offset the State and local costs of providing foster care to children.

**Fair Hearing:** A parent has the right to challenge an "indication" of an SCR report through an OCFS Administrative Review and if unsuccessful there, at a fair hearing. A

fair hearing is conducted before an OCFS Administrative Law Judge who decides if the county was correct in finding allegations to be true by a preponderance of the evidence standard. If the parent prevails, the case is marked unfounded and “sealed”. If the parent fails to prevail, they can further challenge the County and OCFS in county Supreme Court in an Article 78 Proceeding. Parents may be represented by a privately retained attorney but are not entitled to a free lawyer. (Jeter v Poole, NY Court of Appeals, November 2024). The county may not appeal an decision made by OCFS as a result of administrative proceedings.

**Calendar:** Cases scheduled for a given day are included in the court’s calendar.

**Date Certain:** The first time the Court places a child in care, the court will schedule a “date certain” for a first permanency hearing which is usually roughly in 8 months. This date is always subject to modification

**Venue:** Article Ten cases are filed in the county where the child resides or is domiciled whereas criminal cases are filed when the alleged crime took place. For good cause, a case can be transferred to another county.