NEW YORK COUNTY LAWYERS' ASSOCIATION

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REPORT OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION COMMITTEE ON THE FAMILY COURT AND CHILD WELFARE REGARDING S.4383 OF THE NEW YORK STATE LEGISLATURE

The Committee on the Family Court and Child Welfare of the New York County Lawyers' Association opposes Senate bill S.4383 in its present form. This 50-page bill would extensively restructure Family Court proceedings governing initial, continued and permanent separation of families through placement of children in foster care in child protective proceedings as well as by voluntary placement. While its goal of streamlining Family Court proceedings to shorten children's stays in foster care is worthwhile, the bill does so at the cost of seriously undercutting the rights of parents to a meaningful opportunity to be reunited with their children in favor of a disproportionate preference for termination of parental rights and possible adoption, and eliminates necessary procedural protections.

While making the comments that follow, the committee recognizes that S.4383 has many desirable provisions, such as requiring early efforts to locate non-respondent parents and relatives, strengthening the time frames for Family Ct. Act.§1027 hearings, providing for continuous legal representation of parents and children, and expediting appeals procedures and eligibility for poor person's relief. Nevertheless, the extent to which the bill further restricts the rights of families to rehabilitation and reunification and shortcuts procedural protections makes it unacceptable.

1. In particular the bill does so by expanding the definition of "aggravated

circumstances" as a basis for termination of parental rights on grounds such as placement of a child in foster care more than twice; or where the parent has repeatedly refused services necessary for the return home of a child in foster care and offered to the parent; or where a child has been abused after discharge from foster care; or where an infant under five days of age has been abandoned. Once "aggravated circumstances" are found to exist, social services agencies are not required to provide reasonable reunification services to parents (Family Ct. Act §1039-b[b][1]) and proceedings for termination of parental rights may be initiated regardless of the length of time a child has been in foster care. (S.4383, Part A§56; Part B §§1-3,5).

The designation of "aggravated circumstances" was created by the legislature to address extreme cases of severe or repeated child abuse where dispensing with reunification efforts and expedited termination of parental rights was justified.(Family Ct. Act §1012[j]; Social Services Law §384-b[8][a][b]). Severe abuse was defined to include reckless or intentional acts by a parent resulting in serious physical injury to a child and committed in circumstances evincing a depraved indifference to human life, or acts against a child for which a parent was convicted of rape, sodomy or other felony sex offense, the several degrees of homicide, or felony assault. A repeatedly abused child was defined as one to whom a finding of abuse had been made pursuant to Family Ct. Act §1012, based on a parent's commission or facilitation of rape, sodomy or other felony sex offense, and where there had been either a previous finding of abuse of the child by the parent or criminal conviction for such an offense during the preceding five years.

The types of circumstances sought to be classified as "aggravated circumstances" by S.4383 involve far less dire circumstances than severe or repeated abuse. Some of the conduct involved is already covered by existing statutes for termination of parental rights. Permanent neglect proceedings (Social Services Law §384-b[4][d]; Family Ct. Act §§611–634) provide a basis for termination of parental rights of a parent who has repeatedly refused rehabilitation and reunification services after a child has been in placement for one year. S.4383 would cut off such efforts much earlier, in circumstances where case workers' engagement with families is already too weak. Similarly, a child, regardless of age, abandoned for six months, is also subject to termination of parental rights. (Social Services Law§384-b[4][b]). Even with the best intentions, it is highly unlikely that the "aggravated circumstances" designation would permit termination sooner.

As to cases of children placed in foster care two times or abused after discharge from foster care, their characterization as involving "aggravated circumstances" is too vague in the absence of a time interval between placements and is too harsh. Surely, it would make a

difference if two placements were five or more years apart and there might be no necessary relationship between the reasons for placement in the two instances. The mere fact of repeat placement, as distinct from cases of severe or repeated abuse, is not a sufficient reason to deny parents and their children the provision of rehabilitation and reunification services or subject them to termination of parental rights. It is important to remember that the families involved in the foster care system are primarily drawn from impoverished, minority or immigrant groups and are much more easily targeted for state intervention. They require income, housing and social services and not the punishment meted out in the aggravated and repeated abuse cases.

2. At present, the initial placement of a child pursuant to Family Ct. Act Article 10 is limited to one year. (Family Ct. Act §1055[b][i]). Upon the expiration of the initial period of placement, assuming the child is still in care, a social services official or foster care agency is required to file an extension of placement proceeding (Family Ct. Act §1055[b][i][ii][iii]), and to demonstrate that extension of the placement is required consistent with the best interest of the child (Family Ct. Act. §1055 [b][iv]), based on a list of seven enumerated factors, including "whether the child would be at risk of abuse or neglect if returned to the parent. . . .")[1]

The extension of placement proceeding is commenced by the service of a petition on the parent or parents and other interested parties; the manner of service is within the court's discretion but may be by mail. The hearing may not be commenced without proof satisfactory to the court that the parent had actual notice of the hearing. (Family Ct. Act §1055[b][ii][iii]). It has long been established that the petitioning social services agency has the burden of proof and that as a basis for an extension of placement, it must show that "the parent is not presently able to care for his or her children and that the continuation of foster care is in the children's best interests." *In re Glenn B.,303 A.D.2d 498 (2d Dept 2003); Matter of Belinda B., 114 A.D.2d 70,73(4th Dept 1986); In re Umer K., 257 A.D.2d 195 (1st Dept 1999).*

S.4383 (particularly §25 of Part A and proposed Family Ct. Act §§1087,1088,1089) changes this scheme so that the issue of continued placement is no longer the subject of a separate proceeding, but is encompassed within the jurisdiction the Family Court acquired in a child protective proceeding or proceeding to approve a voluntary placement. As part of the change, procedural protections are diluted. A parent is no longer served with a Petition, but with a notice and a permanency plan; service is by mail only; the court need not confirm that the parent had actual notice; there are no enumerated factors for decision; and there is no

[1] A parallel scheme requires court approval of an initial voluntary placement, followed by review proceedings. Social Services Law §§384-a, 358-a, 392.

standard for decision other than "the best interest of the child."

The lack of requirement that the court confirm that the parent had actual notice of the hearing and the absence of a petition specifically alleging why placement should be extended is highly prejudicial. Proposals that do not require proof of actual contemporaneous notice are unacceptable. Because many parents move due to poor housing, some in New York City reside in shelters, and foster care agencies often fail to keep current records of the parent's address, many parents even now do not receive notice of hearings. Rather than dilute notice requirements, social services and child care agencies should be required to serve notice of the permanency hearing after confirming the parent's actual address, or at the agency itself when the parent is present. Likewise, a permanency hearing report, a quasi-social work document, may not provide adequate notice of the basis on which a continuation of placement is being sought.

The absence of a standard and factors for decision as to whether or not a child should return home or continue in foster care is an invitation to subjective and biased decision making, as well as to litigation, and provides yet another reason why this bill in its present form is unacceptable.

3. S.4383 Part A §47 sets out procedures in circumstances where a parent signs a conditional adoption surrender providing for post-adoption visitation, and the surrender is approved by the court. It provides that where such visitation is later denied, the parent may seek to enforce the agreement as to visitation. Up to this point, the procedures are all appropriate. However, after adoption, the bill allows abrogation of the terms of the surrender simply on a "best interest" test. The vague and subjective best interest test is too flimsy in these circumstances and permits betrayal of the surrender agreement. The consequence will be that the parents and children will lose their opportunity for contact and fewer parents are likely to agree to such surrenders. The test for ending visitation should be whether it is "detrimental to the child's health and safety."

4. Part B §5 of S.4383, which amends Family Ct. Act §1042, provides that a parent defaulting in a child protective proceeding shall be served with the court's order of disposition with notice of entry by personal service. Thereafter, the parent may move to have the default vacated for a period of up to one year, upon a showing of reasonable excuse and meritorious defense, except in the case of willful default. The present statute, in the absence of willful default, requires only a showing of reasonable excuse and has no time limit. The amendment fails to provide for vacating a default where a parent was never served with notice, which is the major source of defaults, and to recognize that in those circumstances, no showing of merit is constitutionally required. *Peralta v. Heights Medical Center, 488 U.S.80;*

see also Annello v. Barry, 149 A.D.2d 640 (2d Dept 1989) and Martino v. Rivera, 148 A.D.2d 568 (2d Dept 1989).

This is a seriously flawed bill. It slights both the constitutional rights of families and the long-established strong public policy of the State of New York to respect the rights of parents and children to family integrity, to make a significant effort to render parents of children in foster care capable of caring for their children while protecting their children's health and safety, and to not sever parent-child relationships hastily and prematurely. (See Social Services Law §384-b[1]). For these reasons, it should not be approved in its present form. We hope it can be revised and then reconsidered.

Committee on the Family Court and Child Welfare
New York County Lawyers' Association
Hon. Louise Gruner Gans, Chair