TERMINATION of PARENTAL RIGHTS

A Handbook for proceedings in the
New York Family Court of the State of New York.

Supreme Court of the State of New York
Appellate Division, First Department
Presiding Justice
FRANCIS T. MURPHY, Jr.

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PREFACE

For the one-quarter of New York City's 25,000 foster care children, who cannot be cared for by their biological parents, the only way to secure a permanent, loving environment is through adoption. Yet in New York City, children slated for adoption spend an average of over seven years in foster care before being adopted; it sometimes takes five years for parental rights to be terminated after adoption has been set as the goal.

Many factors contribute to children languishing in foster care: court delays, bureaucratic red tape and the failure of adoption agencies to assign a child a goal of adoption and secure its finalization in a timely manner.

Although the stumbling blocks discouraging adoptions must be eliminated, the significance of permanently terminating the rights of natural parents should not be taken lightly. If a parent's rights are terminated, not only is custody permanently lost, but all rights to access, authority and influence between natural parent and child is forever precluded. In fact, preference for reunification of the biological family is built into the legislation authorizing termination proceedings.

Nonetheless, termination of parental rights is an important and delicate step. These guidelines can help attorneys proceed with the best interest of the children in mind.

CAROL BELLAMY
PRESIDENT OF THE CITY COUNCIL

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I. Introduction

A. Overview

1. The proceedings discussed herein differ from abuse and neglect proceedings in the family courts in one very significant respect:

   an abuse and neglect proceeding is an initial vehicle for the removal of the child from its home, whereas in the termination proceeding, the subject child has already been placed in foster care.

Note: Negelct and abuse cases are sometimes brought after a child is already in foster care--eg, in situations where an agency declines to return a voluntarily placed child upon demand by the parent [Social Services Law §384-a(2)(a)]. Thus, nelgect and abuse cases are not always the initial vehicle for removal of a child from home. The key difference between termination and child protection cases is more precisely the irrevocable and permanent nature of the determination in the former.

2. Additionally, some of the proceedings to be discussed have as their purpose the establishment of de jure custody in a person or agency other than the natural parent.

   a. The distinction between de facto and de jure custody is vital. Only a person having de jure custody can consent to permanent transfer of custody to another person.

   b. An agency having physical (or de facto) custody of the child, absent the parents' surrender of custodial rights, or the involuntary termination thereof, does not have de jure (or legal) custody of the child, and thus may not consent to the adoption of the child.

B. Definitions

1. Authorized agency. SSL §370(10)

   a. Any agency, association, corporation, institution, society or other organization which is incorporated or organized under the laws of this state to care for, to place out or to board out children, which actually has its place of business or plant in this state and which is approved, visited, inspected and supervised by the department or which shall submit and consent to the approval, visitation, inspection and supervision of the board as to any and all acts in relation to the welfare of children performed or to be performed under this title;

b. Any court or any public welfare official of this state authorized by law to place out or to board out children.

2. Place out. SSL §371(12)

a. To arrange for the free care of a child in a family other than that of the child's parent, step-parent, grandparent, brother, sister, uncle or aunt or legal guardian, for the purpose of adoption or for the legal purpose of providing care. See People v. Scopas, 11 N.Y.2d 120, 227 N.Y.S.2d 5 (1962); In re Adoption of Anonymous, 46 Misc.2d 928, 261 N.Y.S.2d 439 (Fam. Ct. Dutchess Co. 1965).

b. "Place" or "commit" includes replace and recommit.

3. Board out. SSL §371(14)

To arrange for the care of a child in a family, other than that of the child's parent, step-parent, or legal guardian, to whom payment is made or agreed to be made for care and maintenance.

4. Home. SSL §371(15) - includes a family boarding home or a family free home.

5. Agency boarding home. SSL § 371(16).

A family-type home for children and/or for minors operated by an authorized agency, in quarters or premises owned, leased or otherwise under the control of such agency, for the purposes of providing care and maintenance therein for children or minors under the care of such agency.

6. Group home. SSL §371(17)

A facility for the care and maintenance of not less than seven nor more than twelve children, who are at least five years of age, operated by an authorized agency except that such minimum age shall not be applicable to siblings placed in the same facility nor to children whose mother is placed in the same facility.

7. Foster child. SSL §371(19)

Any person in the care, custody or guardianship of an authorized agency, who is placed for temporary or long-term care.

8. Foster parent. SSL §371(19)

Any person with whom a child in the care, custody or guardianship of an authorized agency, is placed for temporary or long-term care.

9. Abandoned child.

a. A child under the age of 18 years who is abandoned by both parents, or by the parents having its custody, or by another person or persons lawfully charged with its care and/or custody (SSL §371(2)), and in accordance with the definition or other criteria set forth in SSL §371-b(5)(a).

b. The criteria provide that a child is abandoned by its parent or parents if such parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency. In the absence of evidence to the contrary, such ability to visit and to communicate shall be presumed. SSL §384-b(5)(a).

10. Abused child. SSL §§371(4-b)(i), (ii), (iii)

A child less than 18 years of age whose parents or other persons legally responsible for its care:

a. inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ;

b. creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ;

c. commits, or allows to be committed, an act of sexual abuse against such child as defined in the penal law.

11. Destitute child. SSL §§371(3)(a),(b), (c), (d)

A child who, through no neglect on the part of its parent, guardian or custodian, is:

a. destitute or homeless; or

b. in a state of want or suffering due to lack of sufficient food, clothing, shelter or medical or surgical care; or

c. a person under the age of 18 years who is absent from his legal residence without the consent of his parent, legal guardian or custodian; or

d. a person under the age of 18 who is without a place of shelter where supervision and care are available.

12. Neglected child. SSL §§371(4-a)(i)(A), (B); (ii)

A child less than 18 years of age:

a. whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care

(1) in supplying the child with adequate food, clothing, shelter, education, medical or surgical care, though financially able to do so or offered financial or other reasonable means to do so; or

(2) in providing the child with proper supervision or guardianship by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by using a drug or drugs; or by using alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court; or

b. who has been abandoned by his parents or other person legally responsible for his care.

13. Permanently neglected child. SSL §384-b(7)(a)

A child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child.

C. Entering foster care

1. In New York City, de facto custody generally is obtained initially by the Commissioner of Social Services. The Commissioner, in turn, may transfer de facto custody of the child in his care to another authorized agency. SSL §398(6)(g)

2. A child may be placed in:

a. a public institution for children. SSL §371(18);

b. a group home. SSL §371 (17);

c. an agency boarding home. SSL §371(16);

d. the care of foster parents. SSL §371(19).

3. Children may come into foster care:

a. by voluntary surrender of guardianship and custody by the parent, guardian or custodian. SSL §384;

b. through voluntary transfer of care and custody by the parent, guardian or custodian. SSL §384-a;

c. as a "destitute child," as defined supra. The Commissioner of Public Welfare (in New York City, the Commissioner of Social Services) is responsible for assuming charge of such children. SSL §398(1);

d. through involuntary court termination of parental rights and commitment of guardianship and custody to an authorized agency or foster parents. SSL §384-b; FCA Article 6, Part 1 (permanent neglect). Such termination and commitment may be based on the grounds of:

(1) death of both parents and lack of lawful guardian;

(2) abandonment;

(3) mental illness or mental retardation of the parent or parents;

(4) permanent neglect;

e. as neglected or abused children. FCA Article 10. Temporary removal of the child from the child's residence with the consent of the parent or person legally responsible for his care, if the child is neglected or abandoned. FCA §1021

D. Rights of natural parents, generally

1. The natural parents have a superior right to custody, guardianship and care of the child, as against other persons and without state intervention, absent the unfitness of the parents, surrender of the child or other extraordinary circumstances. Matter of Sanjivini K., 47 N.Y.2d 374, 417 N.Y.S.2d 339 (1979).

2. The natural parents have the right to assistance of counsel and of the assignment of counsel if they are indigent, in the following proceedings:

a. contested adoptions;

b. foster care review;

c. proceedings for transfer of surrender instrument or instrument transferring care and custody;

d. termination of parental rights proceedings. FCA §262

3. If the natural parent is found to be incapable of adequately defending parental rights, then that parent has the right to have a guardian ad litem appointed to represent the natural parent. In re Carmen G. F., 63 A.D.2d 651, 404 N.Y.S.2d 381 (2nd Dept. 1978); see also CPLR §§321(a), 1201.

E. Rights of putative fathers, generally

1. Right to notice of proceedings. Caban v. Mohammed, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979).

2. Right to the opportunity to be heard as to the child's best interests. DRL §111-a; SSL §384-c; see Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Caban v. Mohammed, supra.

F. Rights of foster parents, generally

1. Foster care is generally intended to be temporary in nature. In most circumstances, where the agency has de facto custody of the child, it is mandated to make diligent efforts to strengthen the parent-child relationship. See FCA §§1055(a), 614(1)(c); SSL §384-b(7)(a).

2. In recent years, foster parents have obtained certain rights with respect to the children in their care:

a. They are entitled to written notice of an agency's intention to remove the child from their home;

b. Where the foster parents object to such removal, they are entitled to an agency conference or an independent review. They may appeal an adverse decision in a state "fair hearing," under SSL §§22, 400, or they may further challenge by an Article 78 proceeding. See, e.g., Alan D.M. v. Nassau County Department of Social Services, 58 A.D.2d 111, 395 N.Y.S.2d 666 (2d Dept. 1977).

c. See also Smith v. O.F.F.E.R., 431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977); Ramos v. Little Flower Children's Services, N.Y. Law Journal, April 1, 1980 (Sup.Ct. Suffolk Co. (1980).

d. They are entitled to preference for adoption where they have cared for the child continuously for two or more years. SSL §383(3).

e. They are entitled to intervene as of right in certain proceedings under given circumstances. SSL §§392, 383(3), 384(3); see also In re J., 74 Misc.2d 254, 343 N.Y.S.2d 679 (Fam. Ct. Queens Co. 1973).

f. They are entitled to intervene, at the court's discretion, in appropriate cases. See, e.g., C.F. Curtis v. Ballou, 33 A.D.2d 1034, 308 N.Y.S.2d 770 (2d Dept. 1970); Teeter v. Pruiksma, 47 A.D.2d 101, 364 N.Y.S.2d 656 (4th Dept. 1975), appeal dismissed, 375 N.Y.S.2d 1031; In re Laura Ann, 82 Misc.2d 776, 371 N.Y.S.2d 591 (Fam. Ct. Rockland Co. 1975).

g. They are entitled to testify as to other conditions of the children in foster care review proceedings. In re Padilla v. Flaherty, 74 A.D.2d 528, 425 N.Y.S.2d 21 (1st Dept. 1980).

II. Proceedings for judicial approval surrender instruments. SSL §358-a

A. Introduction

1. S.S.L. §358-a hearings are held regarding temporary transfer instruments as well as permanent surrender instruments to that §358-a proceedings are most often not a type of permanent termination proceeding.

2. The aid to dependent children provisions of the Social Security Act do not provide for reimbursement to the states for the costs of providing foster care for children who have been temporarily placed or permanently surrendered by voluntarily-executed out-of-court instruments. SSL §358-a was thus passed to require that within 30 days after the receipt by the Commissioner of Social Services of such voluntarily-placed children, the Commissioner must petition the family court to make a determination that continued placement of the child is in the child's best interests, and that it would be

contrary to the welfare of the child to return him to his biologic home. By the entry of such an order, the child becomes a court-placed child and thus the state qualifies for federal reimbursement.

3. The court is asked to approve an instrument executed by the parent pursuant to SSL §§384 or 384-a.

   a. A SSL §384 instrument is a surrender of all rights of guardianship and custody of the children to an "authorized agency." The instrument vests in the agency the sole right to consent to adoption of the child, and forever terminates the previously-existing parent-child relationship. The surrender provides legal custody to the Commissioner of Social Services, who then signs a transfer of custody to the authorized agency, which can then consent to the adoption.

   b. A SSL §384-a agency instrument is a <u>temporary</u> "transfer of care and custody" of children to an authorized agency.

   c. No court proceeding under either SSL §384 or 384-b is <u>required</u> for the surrender to be valid.

   d. Where federal funding is not sought, a proceeding in family court or surrogate's court is available to approve surrender under SSL §384(4).

4. SSL §358-a(1) mandates that the Commissioner shall originate such a proceeding. The statute does not provide for any other persons being permitted to initiate the proceeding upon failure of the Commissioner to do so.

5. SSL §358-a(4) provides that notice of the petition be given, in such manner as the family court may direct, to the parents or guardian of the child who executed the placement instrument.

   a. Prevailing practice has been to have a parent execute a waiver of the SSL §358-a hearing and notice at the same time that an authorization for the child's placement is accepted.

   b. SSL §358-a(5) provides, however, that the waiver of the hearing and notice is <u>not</u> to be given effect unless it is contained in an instrument <u>separate</u> from the placement instrument.

c. Under SSL §§358-a(4) and (5), the family court judge retains the discretion to disregard an executed waiver and to direct that notice be given to the parent who has executed the placement instrument.

B. Preliminary procedures

1. The petition is filed by a local social services official. SSL §358-a(1)

a. In New York City, petitions to be filed in the family court are heard at the New York County family court.

b. The petition must be filed within 30 days after the removal of the child from its home.

c. Laches is not grounds for dismissal of the petition.

2. Contents of the petition. SSL §358-a(2)

a. There must be allegations which support the fact that the parent who executed the instrument is unable to make adequate provision for the care, maintenance and supervision of the child in the home.

b. The names and addresses of all persons to whom notice of the proceedings must be given shall be provided.

c. The petition must have the request for a temporary order transferring the care and custody of the child to the social service official, pending the hearing.

d. For requirements as to form, content and execution of the instrument, see SSL §358-a(4), or §§384-a(2b), (2c), (3), (4).

3. Service of notice of the proceedings and a copy of the petition is to be made on such persons and in such manner as the court directs. SSL §358-a.

a. The court in its discretion may dispense with notice to the executing parent if the instrument under SSL §384 contains a waiver. But see supra, re waivers of notice.

b. The court may not honor a waiver contained in a SSL §384-a instrument, including waiver of notice.

c. A non-executing parent or guardian must receive notice.

Note: But see SSL §384(1)(b) concerning a parent who has abandoned the child.

d. Notice to putative fathers. SSL §384-c

(1) SSL §384-c contains no requirement that the putative father sign the instrument of surrender if such father's consent would be required for the child's adoption.

(2) Under SSL §384(1)(b) there is no requirement of notice to a parent who has abandoned the child for a period of 6 months next preceding the execution of the instrument.

(3) The statutory rights of unwed fathers have been altered by the Supreme Court of the United States in Caban v. Mohammed, supra, where the Court declared Domestic Relations Law §111(c) unconstitutional, insofar as it held the consent of the natural father was not required for adoption of the child. The original §111(c) had provided that the unwed biological mother could veto an adoption, but that an unwed father could not. The Court held that this section was unconstitutional, since it discriminated against the unwed biological father.

e. In a proceeding to approve a SSL §384 surrender, the foster parents in whose home the child has been placed for adoption are entitled to notice, and foster parents who have had the child for 24 months are entitled to intervene if a parent seeks to set aside the surrender. SSL §384(3)

4. Assignment of counsel

a. The parent, foster parent or other person having physical or legal custody of the child, is entitled to assigned counsel if financially unable to retain private counsel. FCA §262(a)(iv)

b. The non-custodial parent is probably entitled to assigned counsel if financially unable to retain private counsel.

c. The child is entitled, at the discretion of the court, to assignment of a law guardian if a hearing is to be held. SSL §358-a(6); FCA §249(a). See also Matter of Orlando F., 40 N.Y.2d 103, 386 N.Y.S.2d 64 (1976) (mandatory right to counsel at the ultimate termination of parental rights proceeding).

5. Preparation by counsel for the hearing. Counsel should:

a. obtain a copy of the petition and the surrender or "transfer of care and custody" instrument for review.

b. interview the clients.

Note: The client in a SSL §384-a transfer is entitled to a copy of the instrument upon execution. SSL §384-a(5)

c. determine if the client had the mental capacity to understand the effect of signing the surrender instrument. In In re Adoption of E.A.V., 86 Misc.2d 1079, 383 N.Y.S.2d 507 (Sur. Ct. Bronx Co. 1976), the surrender instrument was held to be valid even though the mother's condition was diagnosed as paranoid schizophrenic. The court reviewed an affadavit submitted by the attorney for the mother and the complete hospital record. The court noted:

"In the instant case, it appears that the natural mother had substantial periods of lucidity in which she completely understood her circumstances. The record reflects a clear understanding of the difficulties of raising her child in view of her condition and marital status and a desire to relieve herself of this responsibility while she coped with her other problems.

The court is satisfied that, at the time of execution of the petition, the natural mother, represented by counsel, voluntarily surrendered any right to the infant and accordingly is not a party necessary to the instant proceedings."

d. consider requesting independent psychiatric and/or psychological examinations of all parties, pursuant to County Law §722-c.

Note: The fact that the parent who signs the surrender instrument is an infant does not impair the validity of the surrender. See Spokas v. McCarthy, 7 Misc.2d 963, 164 N.Y.S.2d 198 (Sup.Ct. N.Y.Co. 1957); Application of Presler, 171 Misc. 559, 13 N.Y.S.2d 49 (Sup.Ct.Chemung Co. 1939). People ex rel "C" v. Spence-Chapin Services to Families and Children, N.Y. Law Journal, March 27, 1980 (S.Ct., N.Y.Co.) (Kassal, J.), (a sixteen year old may be found to have been mature enough to sign a valid surrender.) In Re David R., 101 Misc.2d 41, 420 N.Y.S.2d 675(F.Ct., N.Y.Co., 1979)(a grandparent's surrender was not approved because of her lack of comprehension of English; no interpreter was present when the instrument was signed). Additionally, Matter of Baby Boy K., 99 Misc.2d 129, 415 N.Y.S.2d 602 (F.Ct. N.Y.Co., 1979) (the consent of a judicially-declared incompetent to a surrender instrument was held to require the ratification of the incompetent's committee, as well as of the Supreme Court justice who appointed the committee).

C. The hearing

1. A parent executing the instrument may consent to a waiver of the hearing. SSL §358-a(5)

   a. Waiver in a SSL §384-a surrender must be contained in a separate instrument. See supra.

   b. The court has the discretion to ignore a waiver.

   c. If a hearing is waived, the court may make a determination based solely on the petition, and on other papers and affidavits which have been submitted, if the court is satisfied that the allegations in petition are sufficiently established. SSL §358-a(5)

2. Pending a hearing, the court may make a temporary order transferring care and custody of the child, if an immediate hearing on notice is impractical. SSL §358-a(5)

3. **If a duly executed and acknowledged SSL §384 surrender shall so recite, no action or proceeding may be maintained by the surrendering parent or guardian for the custody of the surrendered child or to revoke or annul such surrender where the child has been placed in the home of adoptive parents and more than 30 days have elapsed since the execution of the surrender. SSL §384(5)**

   a. **An action may however be maintained if it is alleged there was fraud, duress or coercion in the execution of the surrender. See In re Nicky, 81 Misc.2d 132, 364 N.Y.S.2d 970 (Sur. Ct. Kings Co. 1975).**

   b. **In re Janet G. v. New York Foundling Hospital, 94 Misc.2d 133, 403 N.Y.S.2d 646 (Fam. Ct. N.Y. Co. 1978), set aside the surrender instrument where the evidence showed that the surrender was not voluntary, informed and a knowing decision by the mother.**

4. If thirty days have not elapsed since the execution of the surrender instrument, or if the infant is not in an adoptive home, the court, if it feels that it is in the best interests of the child and that the parent is fit or able, may return the child to the parent despite the existence of the surrender. See People ex rel. Grament v. Free Synagogue Child Adoption Committee, 194 Misc. 332, 85 N.Y.S.2d 541 (Sup. Ct. N.Y. Co. 1949), where the court noted that the surrender document is "a contract bearing statutory sanction and approval" which "materially alters and diminishes the rights" of a parent "seeking to regain custody," but "it may not accomplish an irrevocable commitment of custody and guardianship" before actual adoption. 194 Misc. at 335, 85 N.Y.S.2d at 543.

5. In People ex rel. Anonymous v. Saratoga County Department of Public Works, 30 A.D.2d 756, 291 N.Y.S.2d 526 (3rd Dept. 1968), the court stated:

"Concededly there is a definite contractual relationship which arises between a parent or parents who give up a child pursuant to SSL §384 and the accepting agency. (citations omitted) However, until formal adoption occurs by the foster parents, it is a contract which, pursuant to SSL §383, is subject to judicial supervision and thus if it feels that it is in the best interests of of the child and that the parents are fit and able to maintain and educate the child, the court, despite the agreement, can revest custody in the parent."

6. The court, in In re Franciska J. G. G. v. DuQuette, 64 A.D.2d 787, 407 N.Y.S.2d 750 (3rd Dept. 1978), held where notice of revocation of surrender for adoption and demand for return of the child, is made within 30 days after the document was executed, and before the infant had been placed, then the court had power to direct a change of custody back to the parent. See also Donald B.B. v. Liddle, 63 A.D.2d 1052, 405 N.Y.S.2d 812 (3rd Dept. 1978).

7. In the Matter of Baby Boy P., 85 Misc.2d 1001, 382 N.Y.S.2d 644(Fam. Ct. Putnam Co. 1976), held that the mother could maintain a proceeding to regain custody of the child which had been surrendered for adoption. Notice by the mother was given within the thirty-day period.

8. Where a SSL §384-a transfer is by a person to whom the parent entrusted care of the child, the rights and obligations of the parent are not affected thereby. SSL §384-a(1)

9. The judge may grant the petition, approve the instrument and transfer guardianship or care and custody if he finds:

   a. The parent executed the instrument knowingly and voluntarily;

   b. the parent is unable to make adequate provision for the care, maintenance and supervision of the child in the home;

   c. the best interests and welfare of the child would be promoted by removal from the home;

   d. it would be contrary to the welfare of the child to remain in the home.

10. Absent a showing of surrender, abandonment or unfitness of the parent, it is unlikely that a court could grant a petition if the non-custodial parent appears in court to contest a surrender instrument under SSL §384-a. Ulster County Department of Social Services v. Irva "XX," 57 A.D.2d 1009, 394 N.Y.S.2d 498 (3rd Dept. 1977).

11. The executing parent must be served with an order approving the instrument, and notice of the terms and conditions under which care and custody will be returned to the parent. SSL §358-a(7).

12. SSL §358-a(8) specifically confers the right to appeal:

   a. any order denying any petition of a Department of Social Services official;

   b. any order granting or denying the parent's petition for return of the child.

D. Parent's remedies

1. The Department of Social Services official is required to return the child to the parent without further court orders, if a specific time is set for the return, or if other terms and conditions so require. SSL §358-a(7)

a. In Phyllis W. v. Commissioner of Social Services, 88 Misc.2d 242, 387 N.Y.S.2d 365 (Fam. Ct. Kings Co. 1976), the court held that in a proceeding to approve a SSL §384-a transfer instrument, the rules provided in SSL §384-a for the return of the child should apply, in addition to the rules in SSL §358-a, on the same matter.

b. SSL §384-a(2)(a) provides:

(1) where the return of the child is required by an instrument, is on a certain date, or upon the occurrence of an identifiable event, the agency shall return the child unless the agency obtains a court order prior to the date or event, or within ten days thereafter; or so long as the parent is unavailable or incapacitated to receive the child.

(2) the parent can make a written demand for the return of the child prior to the identified date or event. The agency must notify the parent within ten days if it intends to refuse to return the child. The agency may refuse to return the child without a court order. If the agency denies or fails to act on such a request for the return of the child, the parents may bring a petition and order to show cause in family court, or a write of habeas corpus in the supreme or family court.

(3) if no date or event is specified in the instrument for the return of the child, the agency must return the child within twenty days after receiving notice from the parent, unless such action would be contrary to a court order obtain within such twenty days.

2. In Phyllis W. v. Commissioner of Social Services, supra, the court further held that current provisions regarding the obligation to return a voluntary-placed child would not be applied retroactively; thus, the parent in that case had the burden to establish that custody would be in the child's best interests. However, the thrust of the current provisions for all cases arising subsequent to the enactment of the statute is to place the onus on the agency to demonstrate why return cannot be effectuated within the statutory time frame (e.g., by obtaining a court order on a neglect case), not to burden the parent with responsibility for initiation of proceedings. In this regard, Duchesne v. Sugarman, 566 F.2d 817 (2Civ., 1977), establishing a federal damage cause of action under 42 U.S.C. §1983 for wrongful retention of a child by the Department of Social Services without a hearing, is germane.

4. In Ruth J. v. Beaudoin, 55 A.D.2d 52, 389 N.Y.S.2d 473 (3rd Dept. 1976) the court held that the infant should be returned to the mother. The court noted that the mother "signed the surrender agreement in good faith, believing that her child would be returned...upon giving notice...." There was no issue here that the parent was neglectful or unfit. The court noted further that:

"It should be noted that the custody of the infant was never granted to the respondent on any long-term basis and the petitioner has not by inaction created a situation where in fact a long-term custody had existed so as to invoke the rule favoring the stability of continuing custody in a person having possession of the infant."

4. Where no definite date for return is fixed in the instrument, or where the Department of Social Services official fails to return the child in accordance with the terms of the instrument, the parent may seek the return of the child by petition and an order to show cause in the family court or by writ of habeas corpus in the supreme court. SSL §358-a(7)

5. Where the court denies a SSL §358-a petition, the Department of Social Services official may not retain custody of the child.

Note: The duty to take other action or offer other services to promote the welfare and best interests of the child, is not affected by the denial of the petition. SSL §358-a(7)

6. Approval of the instrument in SSL §358-a proceeding does not foreclose the parent's challenging the validity of such instrument in any other proceeding. SSL §358-a(3) Other proceedings in which the parent may challenge the validity of the instrument include:

a. a habeas corpus proceeding under CPLR Article 70;

b. adoption prodeedings under DRL §111(2)(b).

III. Termination of parental rights under FCA Article 6 (Permanent Neglect) and SSL §384-b (Commitment of Guardianship and Custody)

A. Introduction

1. FCA Article 6 (permanent neglect proceedings) and SSL §384-b (guardianship proceedings) afford similar methods for the involuntary permanent termination of parental rights.

2. To clarify interrelationship between Article VI of the Family Court Act and S.S.L. §384-b. Article VI is the procedural vehicle for adjudicating petitions alleging permanent neglect, which is one of the grounds enumerated in S.S.L. §384-b. Thus, S.S.L. §384-b(3)(f) cross-references Article VI as the governing procedural statute for permanent neglect cases under S.S.L. §384-b(4)(d). Article VI, which includes, inter alia, provisions for a dispositional hearing, does not apply to the other grounds enumerated in S.S.L. §384-b--i.e., mental illness and abandonment--although some cases have read such a requirement into the statute. See, e.g., Matter of Wesley L.,72 A.D.2d 137, 423 N.Y.S. 2d 482(1st Dept., 1980); In Re N. Children, 435 N.Y.S.2d 1018(F.Ct.,Kings Co., 1981)(Rand, J.) (mental illness); In Re Maeru P., 104 Misc.2d 895, 429 N.Y.S.2d 548(F.Ct., N.Y.Co., 1980); Matter of Daniel Aaron D., New York Journal, October 2, 1980(F.Ct.,N.Y.Co., 1980)(Marks, J.). To maximize the clarity of the section, permanent neglect, under S.S.L. §384-b(4)(d) and F.C.A. Art. VI, should be defined and discussed separately from abandonment and mental illness cases arising under S.S.L. §§384-b (4)(b)and(4)(c).

3. Some proof requirements are different. Permanent neglect may fall short of abandonment, but the condition must exist for one year, while abandonment may be for only six months. Further, in the permanent neglect proceeding the agency must demonstrate its diligent efforts to encourage and strengthen the parent-child relationship.

It must be noted that "(t)he requirement in a permanent neglect proceeding for custody of a child under Article 6 of the Family Court Act, that the petitioning agency has made diligent efforts to strengthen the parental relationship, is inapplicable to a proceeding under section 384 of the Social Services Law to terminate parental rights based upon abandonment of a child for six months....The permanent neglect proceeding was created by the Legislature to supplement the few instances, abandonment among them, wherein adoption without parental consent was allowable. The alternative proceedings based upon abandonment or neglect were intended to be separate and distinct, with the choice of means of termination dependent upon the circumstances." In the Matter of Anonymous, 40 N.Y.2d 96, 351 N.E.2d 707, 386 N.Y.S.2d 59 (1976), reversing 48 A.D.2d 696, 368 N.Y.S.2d 372 (2d Dept. 1975).

4. Guardianship and custody of destitute and dependent children - commitment by court order. SSL §384-b

a. The growth of children in a permanent home with a normal family life offers the best opportunity for children to develop and thrive. SSL §384-b(1)(a)(i)

b. It is generally desirable for a child to remain with or be returned to the natural parent because the natural home will usually best satisfy the child's need for normal family life.

Note: Parents are entitled to bring up their own children unless the best interests of the child would thereby be endangered. SSL §384-b(a)(ii)

c. The state's first obligation is to help the family with services to prevent the break-up of that family or to reunite the family if the child has already left home. SSL §384-b(a)(iii)

d. When it is clear that the natural parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought. SSL §384-b(a)(iv)

e. Unnecessarily protracted foster care is undesirable and timely procedures to terminate parental rights could reduce such protracted foster care.

Note: Legislative enactments intend to provide procedures to protect the rights of natural parents and, where the best interests of the child require it, to protect those interests by terminating parental rights and freeing the child for adoption. SSL §384-b(1)(b)

f. There are four circumstances under which the court may terminate parental rights and commit guardianship and custody of a child to an authorized agency under SSL §384-b(4):

(1) where there is no lawful guardian;

(2) where the child has been abandoned;

(3) where the parent suffers from mental illness or mental retardation;

(4) where there is permanent neglect of the child.

Note: A court may not terminate parental rights when there has been no parental consent, abandonment, neglect or proven unfitness, even though some may find adoption to be in the best interests of the child. See Matter of Sanjivini K., 47 N.Y.2d 374, 417 N.Y.S.2d 339 (1979); Matter of Corey L. v. Martin L., 45 N.Y.2d 383, 408 N.Y.S.2d 439 (1978).

g. Consent of the parent

(1) One purpose of termination proceedings is to free children for adoption. To do this, the parent's consent must either be obtained or dispensed with.

(2) Dispositional orders in FCA Article 6 or SSL §384-b proceedings operate to dispense with the necessity of obtaining the parent's consent to adoption. In permanent neglect cases under SSL §384-b(4)(d) and F.C.A. Art. VI, parental consent to adoption can be dispensed with only if the proceedings result in an order under FCA §634 committing guardianship and custody to the petitioner. Other dispositional orders, obviously, would not lead to that result.

(3) DRL §111 sets forth persons whose consent to the adoption is required:

(a) the child, if over 14 years of age, unless the judge dispenses with it;

(b) surviving parent(s), if a child was born in wedlock;

(c) the mother of a child born out of wedlock (see infra for the rights of the putative father; Caban v. Mohammed, supra, which held DRL §111(1) unconstitutional since it discriminated against the unwed biological father in not requiring his consent);

(d) any person or authorized agency having lawful custody of the child.

(4) DRL §111 also sets forth the persons whose consent is not required:

(a) a parent or other person having custody:

(i) who evinces intent to forego parental or custodial rights and obligations by a failure for six months to visit with and communicate with the child or person having legal custody of the child, although able to do so;

(ii) who executed a SSL §384 surrender to an agency;

(iii) whose parental rights were terminated in a SSL §384-b proceeding;

(iv) whose civil rights have been deprived pursuant to Civil Rights Law §79 (e.g., a felon sentenced to life imprisonment) and not subsequently restored. See Matter of Sonia V. R., 97 Misc.2d 694, 412 N.Y.S.2d 257 (Fam. Ct. N.Y. Co. 1978), where there was no need for consent and therefore could not have been found to have abandoned the child.

(v) who by reason of mental illness or retardation (as defined in SSL §384-b(6)) is presently and for the foreseeable future unable to provide proper care for the child;

(vi) who has executed an irrevocable instrument denying paternity of the child or consenting to the other parent's surrender of the child or that other parent's consent to the child's adoption.

h. Rights of the putative father

(1) DRL §111 does not require the consent of the putative father to adoption of his out-of-wedlock child. Note, however, that Caban v. Mohammed, supra, has held otherwise, and should be considered as controling.

(2) In Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), the Supreme Court held that the putative father was entitled to due process notice and the opportunity to be heard before his parental rights could be terminated.

(3) In re Adoption of Malpica, 36 N.Y.2d 568, 331 N.E.2d 486, N.Y.S.2d 511 (1975), appeal dismissed, 423 U.S. 1042, 96 S.Ct. 765, 46 L.Ed.2d 631 (1976), held that Stanley v. Illinois, supra, did not require consent of the putative father. Only due process opportunity to be heard as to the child's best interests is required. See also In re Kenneth M.,

87 Misc.2d 295, 383 N.Y.S.2d2d 1005 (Fam. Ct. N.Y. Co. 1976).

4. SSL §384-c and DRL §111 were enacted in 1976 to specify (and thereby limit) the circumstances under which a putative father was entitled to notice in SSL §358-a, SSL §384, SSL §384-b and DRL Article 7 proceedings:

   (a) As a person adjudicated the father of the child by a court of a state or territory of the United States (if other than New York State, the court must file a certified copy of the order with the putative father registry under SSL §372-c);

   (b) As a person who has timely filed an unrevoked notice of intent to claim paternity under SSL §372-c;

   (c) As a person recorded on the birth certificate of the child as the father;

   (d) As a person living openly with the child and the child's mother at the initiation of the proceedings, or at the time when the child is placed in the care of an agency; and who is holding himself out to be the child's father;

   (e) as a person identified as the father in a written, sworn statement of the child's mother;

   (f) as a person married to the child's mother within six months subsequent to the birth of the child, and prior to the execution of a SSL §384 surrender, or the initiation of a SSL §384-b proceeding.

(5) Both DRL §111-a(3) and SSL §384-c(3) limit the putative father's involvement to presentation of evidence relevant to the best interests of the child, i.e., affirms lack of requirement of consent.

   (a) The putative father may object to the adoption of the child. However, he must demonstrate that it will not be in the child's best interests to terminate the relationship. In re Gerald G. G., 61 A.D.2d 521, 403 N.Y.S.2d 57 (2d Dept. 1978).

(b) In a SSL §384-b proceeding, where it is alleged that the child is a permanently neglected child, the putative father may appear and present evidence only at the dispositional hearing. SSL §384-c(3).

Note: In other proceedings under SSL §384-b(4), the putative father of the child may appear and present evidence in the fact-finding hearing, except where he is alleged deceased.

B. Preliminary procedure

As stated earlier, most procedures set forth in FCA Article VI proceedings are also applicable to permanent neglect proceedings brought under SSL §384-b(4)(d).

1. Jurisdiction

a. The family court and the surrogate's court have original concurrent jurisdiction over proceedings under SSL §§384-b(4)(a), (b)--where the parents are alleged to be deceased and there is no guardian, or where the child is alleged to be abandoned.

b. The family court has jurisdiction over proceedings brought under SSL §§384-b(4)(c),(d)--where mental illness or mental retardation of the parent is alleged, or where the child is alleged to be a permanently neglected child. SSL §384-b(3)(d)

c. The petitioner has a choice of the forum in proceedings brought under SSL §§384-b(3)(b), (c).

2. Procedural law applicable

a. The Surrogate's Court Procedure Act applies, absent any conflict with specific provisions of the Social Services Law, in proceedings commenced in the Surrogate's Court. SSL §384-b(3)(f)

b. Family Court Act Articles 1, 2 and 11 apply in family court proceedings, absent any conflict with specific provisions of the Social Services Act. SSL §384-b(3)(f)

c. Where permanent neglect is the basis for seeking termination, FCA Article 6, Part 1, applies. SSL §384-b(3)(f). FCA §611 contains a cross-reference incorporation. See SSL §384-b(7)(a); FCA §614.

3. Petitioner

   a. The proceeding is originated by the filing of the petition, which may be filed by:

      (1) an authorized agency, SSL §384-b(3)(b), which is defined in SSL §371(10) and FCA §119;

      (2) a foster parent authorized by the court, SSL §384-b(3)(b), pursuant to SSL §392(7)(c), or FCA §1055(d).

4. Venue is in the county in which the agency has an office or where the child or his parents reside at the time of the initiation of the proceedings. SSL §384-b(3)(c)

5. Notice and service of process

   a. Notice is served on parents and such other persons as the judge in his discretion may prescribe. SSL §384-b(3)(e).

   b. Notice must inform the party that:

      (1) the result of the proceeding may be an order freeing the child for adoption without the consent of or notice to the parents;

      (2) the party has the right to have counsel appointed if the party is indigent. SSL §384-b(3)(e)

   c. In family court, process is served in accordance with FCA §617. In the surrogate's court, process is served in accordance with SCPA §307. SSL §384-b(3)(e)

      (1) FCA §617 provisions for service:

         (a) personal service of a summons and the petition, at least twenty days' notice;

         (b) the judge may order substituted service or service by publication if, after reasonable effort, personal service is not made;

         (c) SPCA §307 governs the manner of personal service; CPLR §316 governs service by publication, save that <u>just one</u> publication is required.

(2) Notice to putative fathers. SSL §384-c

(a) Personal service of notice and copy of the petition made at least twenty days prior to the proceeding. SSL §384-c(4)

(b) On a showing to the court that personal service cannot be effected, at the last known address and with reasonable effort, notice may be given by registered or certified mail to the last known address. SSL §384-c(4)

(c) Notice by publication is not required to be given in these specific proceedings. SSL §384-c(4)

(d) Notice must inform the putative father of the time, date, place and purpose of the proceedings and apprise that failure to appear shall constitute a denial of interest in the child which may result in transfer of guardianship or in the child's adoption. SSL §384-c(6)

6. Allegations of the petition in permanent neglect proceedings - FCA §614

Note: SSL §384-b contains no similar requirements to these except that the petition must set forth the names and addresses of persons entitled to notice. The enumerated requirements of FCA §614 apply in all proceedings brought under SSL §384-b(4)(d).

a. The child must be under 18 years of age;

b. The child is placed in the care of an authorized agency;

c. The agency has made diligent efforts, and must specify the efforts; or, if the efforts were not made, the specified reasons that efforts would be detrimental to the moral or temporal welfare of the child;

d. The parent or guardian has failed for more than one year following the child's placement, continuously and substantially or repeatedly, to maintain contact with the child or to plan for the future of the child, although the parent or guardian is physically and financially able to do so;

e. The best interests of the child require commitment of guardianship to an agency or foster parent.

7. Assignment of counsel

a. In family court

(1) Counsel for the parent, foster parent or other person having physical or legal custody of the child, is assigned pursuant to FCA §262(a)(iv).

(2) The law guardian for the child is assigned pursuant to FCA §249; Matter of Orlando F., supra.

b. In surrogate's court

(1) Counsel for an adult respondent who appears is assigned pursuant to SCPA §407. Legislation to cover the defaulting respondent appears imminent.

(2) The guardian ad litem for the child is assigned pursuant to SPCA §403-a.

c. In New York City, the family court 18-b panels are the panels designated for surrogate's court assignments to adult respondents. In the family court, the Legal Aid Society generally appears as law guardians.

8. Role of counsel

The roles for counsel to the parent, the foster parent and the child are in general significantly different.

a. Role of counsel for the parent

(1) If the client wishes, seeks the return of the child. At the least, seeks to avoid termination of parental rights, even if the placement continues.

(2) In some cases, the parent may wish to give up custody and guardianship. If so, counsel must advise the client:

(a) of the consequences of so proceeding, especially in light of the permanency of the decision and the likelihood of there being no further contact with the child;

(b) of the right to contest the proceedings;

(c) of the possibility of the court's use of the finding in subsequent child protective proceedings.

(3) Counsel should challenge the introduction of material which:

(a) cannot be established to be a business record. CPLR §4518;

(b) was not made "at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" -- that is, while the memory of the event was still fresh enough to be fairly reliable. See e.g., Halsey v. Sinsebaugh, 15 N.Y. 485, 488 (1857).

(i) A witness must testify that the record was made in the regular course of the agency's business, that it was part of the regular business of the agency to make the record and that the various entries were made within a reasonable time after the acts, events or occurrences recorded. A permanent record prepared months after the event may nonetheless be admitted in evidence if transcribed in the regular course of business from contact cards or other notes made contemporaneously with the events. Matter of "Male" G., 97 Misc.2d 283, 411 N.Y.S.2d 102 (Fam. Ct. N.Y. Co. 1978).

(ii) There is a problem if the record contains information from third-party sources, that is conclusory or replete with surmise, conjecture or opinions of persons called to testify as expert witnesses.

(iii) In Matter of Leon R. R., 66 A.D.2d 118, 412 N.Y.S.2d 474 (3rd Dept. 1979), reversed 48 N.Y.2d 117, 421 N.Y.S.2d 863 (1979), the court admitted into evidence the entire case record of DSS, even though it contained inadmissible statements from third party sources. The trial court indicated that it would disregard all such statements which would not survive a hearsay challenge. The Court of Appeals noted:

"This was error. That this facile practice cuts against the grain of our adversary system is obvious. But, more important, it raises a substantial probability of irreparable prejudice to a party's case for there is simply no way of gauging the subtle impact of inadmissible hearsay on even the most objective trier of fact. Nor is notice or an opportunity to respond afforded....Each report in the (record) and each of the statements contained in those reports were admissible only if they qualified as business records (citation omitted). To constitute a business record exception to the hearsay rule, the proponent of the record must first demonstrate that it was within the scope of the entrant's business duty to record the act, transaction or occurrence sought to be admitted. But this satisfied only half the test. In addition, each participant in the chain producing record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception (citation omitted). Thus, not only must the entrant be under a business duty to record the event, but the informant must be under a contemporaneous business duty to report the occurrence to the entrant as well (citation omitted).

...(i)t is essential to emphasize that the mere fact that the recording of third-party statements by the caseworker might be routine, imports no guarantee of the truth, or even the reliability, of those statements. To construe these statements as admissible simply because the caseworker is under a business duty to record would be to open the floodgates for introduction of random, irresponsible material beyond the reach of the usual tests for accuracy--cross-examination and impeachment of the declarant. Unless some other hearsay exception is available (citation omitted), admission may only be granted where it is demonstrated that the informant has personal knowledge of the act, event or

condition and he is under a business duty to report it to the entrant (citations omitted)."

(iv) Agencies tend to rely heavily and often exclusively on the case record, since there is no distinction in the statute between written and oral proof. In Matter of Suzanne N.Y., 102 Misc.2d 215, 423 N.Y.S.2d 394 (Fam. Ct. N.Y. Co. 1979), the court noted that the only oral testimony adduced was that of a supervisor. The supervisor lacked personal knowledge of the case; his only function was to lay the foundation for admission of the case record into evidence. The court commented on this practice:

"It denie(s) this Court, as the trier of fact, the opportunity to consider the appearance, attitude and demeanor of witnesses in testing veracity, and determining the weight to be accorded their testimony (citations omitted). The Court of Appeals has recently reemphasized the especial importance in child custody, visitation or neglect proceedings that appropriate factual findings be made by the trial court--the court best able to measure the credibility of witnesses, (citation omitted) and that the greatest respect be accorded the nisi prius court where assessments of the credibility of witnesses are made. (citation omitted) That is nigh on impossible where there are no live witnesses testifying on the central issues involved. Case reversed on other grounds-pending in Court of Appeals.

(d) is irrelevant or prejudicial. See, e.g., Del Toro v. Carroll, 33 A.D.2d 160, 306 N.Y.S.2d 95 (1st Dept. 1969).

(e) Matter of Lisa Ann U., 75 A.D.2d 944, 427 N.Y.S.2d 994 (3rd Dept. 1980). In this case the court indicated that respondent's counsel had not made any specific objections to material in the case record despite having had over 40 days to review the file. The court concluded that the principles of "fundamental fairness" had been complied with.

(f) Matter of Melanie Ruth JJ, 76 A.D.2d 1008, 429 N.Y.S.2d 773 (3rd Dept., 1980) the court noted that the introduction of the entire file at the hearing was not error where mother's attorney had the opportunity to examine case records prior to the hearing and evidenced familarity with the case file.

(g) Matter of Florence X, 75 A.D.2d 942, 428 N.Y.S.2d 80 (3rd Dept. 1980) the court noted that the introduction of the entire social services' case record without providing advance notice to parent or adequate opportunity to examine the contents violated the principle of "fundamental fairness."

(4) **Counsel should always review all relevant records prior to the fact-finding hearing.**

b. Role of counsel for foster parent

(1) Generally the role is to seek an order committing custody and guardianship;

(2) Where the foster parents are authorized to commence the proceeding pursuant to FCA §1055 or SSL §392, the court may commit guardianship to them.

(a) Counsel should advise the foster parent to whom guardianship is committed to commence the adoption proceeding within six months of the order. SSL §384-b(3)(a)

(b) Counsel should also demonstrate to the court that the foster parents made numerous attempts to encourage the improvement of the relationship between the child in their custody and the natural parents.

c. Role of the law guardian for the child

(1) The Court of Appeals holding in Matter of Orlando F., supra, is instructive in this regard:

"Our courts have been sensitive to the expanding rights of children, including the right to be heard (citations omitted) and, only recently, the importance of having the child represented by a Law Guardian was emphasized '(s)ince the child cannot obviously speak for herself' (citations omitted). The usual situation in a permanent neglect proceeding pits the natural parent, with his or her own special interest at stake, against an agency who seeks termination of parental rights so that the child might ultimately be adopted. These parties may well believe that the 'best interests' of the child will be served by a 'legal victory' on their part. One court recently observed: 'Without

such representation, the natural parent vigorously focuses on parental rights and claims. The approach centers on whether 'this child belongs to me,' without an equal inquiry, on behalf of the unrepresented infant on whether 'this parent belongs to me.' (citation omitted) Consequently, although no statute currently so provides, we hold that, in the absence of the most extraordinary of circumstances, at the moment difficult to conceptualize, the Family Court should direct the appointment of a Law Guardian in permanent neglect cases to protect and represent the rights and interests of the child in controversy."

(2) The family court's function is to determine first whether statutory grounds exist to terminate parental rights and, if so, what disposition would be in the child's best interests. The law guardian for the child must assist the court in making both of those determinations, but does not assume the court's role of judging his client's "best interests." He must articulate and advocate the client's point of view and legal rights, consistent with his obligations as an attorney. Additionally, he must facilitate a full and balanced presentation of the facts, while performing his own investigations with the aid of experts where appropriate.

(3) The law guardian's discovery and preparation is critical for the effective performance of such functions. Of vital importance is the utilization of social workers and, where appropriate, clinicians, to assist in investigations and planning. While the requirements will vary from case to case, the law guardian must:

(a) interview the parents (with the concurrence of their attorneys);

(b) confer with the child, to elicit his preferences and to explain potential consequences of the proceedings;

(c) examine all case records, reports and recommendations of the petitioner's social workers, as well as those of the Department of Social Services, court-related agencies and hospitals;

(d) make an independent investigation with the aid of social workers and clinicians when appropriate, regarding statutory grounds for the action and all possible dispositional outcomes;

(e) request an examination of the child by a physician, psychiatrist or psychologist when appropriate;

(f) present the clinent's position and evidence concerning the child's needs, especially any special health, education or psychiatric needs the child may have;

(g) cross-examine any witnesses presented by all parties concerning the allegations in the petition and the needs of the child;

(h) assist in referrals for any necessary supportive services in order to carry out interim or final orders of the court;

(i) ensure compliance with all orders of the court relating to the client, bringing any problems to the attention of the court by virtue of its continuing jurisdiction (e.g., if adoption is ordered but not carried out.)

(d) If counsel finds, after an interview and other investigations, that the client cannot understand the nature and consequences of the proceedings which affect the client, and is, therefore, unable to determine his own best interests rationally in the proceedings, counsel should promptly bring that circumstance to the attention of the court, and ask that a guardian ad litem be appointed on behalf of the client.

C. Preparation for trial

1. Client interview

2. Demand agency case records and review them

3. Request photocopies of pertinent parts of case records

4. At the earliest opportunity, counsel should move for an order allowing the client visitation with the child.

D. Definitions, standards of proof and special evidentiary rules

1. There are four grounds for an order committing guardianship. SSL §384-b(4)

   a. Both parents are dead and there is no lawful guardian;

   b. Abandonment for 6 months immediately prior to the initiation of the proceedings;

   c. Permanent neglect for one year following placement of the child with an agency;

   d. Mental illness or mental retardation of the parent whose child has been in placement for one year immediately prior to the initiation of the proceeding.

2. Definitions

   a. Both parents of the child are dead and guardian of the child has been lawfully appointed. SSL §384-b(4)(a); see Chautaugua County Department of Social Services v. McNeely, 71 A.D.2d 807, 419 N.Y.S.2d 360 (4th Dept. 1979).

      (1) Proceedings on this ground may be commenced in the family court or the surrogate's court. SSL §384-b(3)(d)

      (2) Proof of the likelihood that the child will be adopted or placed for adoption is not required. SSL §384-b(3)(i)

      (3) The standard of proof in this proceeding is a fair preponderance of the evidence. SSL §384-b(3)(i)

Note: In this situation, as in others, the issue of whether Addington v. Texas, 441 U.S. 419 (1979), should be construed to require "clear and convincing evidence" in termination of parental rights proceedings is now before the United States Supreme Court, in Matter of Santowsky, a New York case appealing Matter of John AA, 75 A.D.2d 910, ___ N.Y.S.2d ____ (3rd Dept. 1980).

(4) A dispositional hearing is not required. Matter of Kimberly I., 72 A.D.2d 831, 421 N.Y.S.2d 649 (3rd Dept. 1979).

b. Abandonment is defined in SSL §384-b(5).

Note: Prior to the enactment of the present SSL §384-b, there were considerable case law definitions of abandonment. These cases have either been incorporated into SSL §384-b, or would appear to have been superseded by the new statutory scheme.

(1) The parent must have evinced the intent to forego parental rights and obligations, as manifested by a failure to visit and communicate with the child or agency, although the parent was able to do so, and not prevented or discouraged from doing so by the agency.

(a) Abandonment can be made out only from "a settled purpose to be rid of all parental obligations and to forego all parental rights." See Matter of Susan W. v. Talbot G., 34 N.Y.2d 76, 80, 356 N.Y.S.2d 34 (1974); Matter of Maxwell, 4 N.Y.2d 429, 433, 176 N.Y.S.2d 281, 283 (1958).

(b) In the case of In re Jennifer "S.," 69 Misc.2d 951, 333 N.Y.S.2d 79 (Sur. Ct. N.Y. Co 1972), the court noted:

"I find that during the five-and-a-half years of Jennifer's life her mother never made any effort to contact or visit Jennifer, or the agency in whose custody she had been placed. No presents, cards or communications were ever sent from mother to child and no visits were ever made. The only indication that this mother desires the return of her child is her naked statement to that effect. She has never performed any act that would tend to insure the return of Jennifer to her until her recent move to Beacon, although numerous opportunities for such action

were afforded to her. Instead, while insisting that she wants the child returned, she has placed more obstacles between herself and this child, by setting her own condition for the child's return and taking no action to fulfill this condition. I therefore find that Jennifer is an abandoned child."

(c) The court, in In the Matter of Angel Guardian Home v. Mendez, 60 A.D.2d 600, 400 N.Y.S.2d 124 (2d Dept. 1977), found that although clear testimony established neither parent had visited or contributed to support of the children for six months preceding the hearing, before abandonment could be established, the court was required to make an inquiry into the question of whether the failure to visit or contribute occurred without good reason.

(d) In the case of In re Ellick, 69 Misc.2d 175, 328 N.Y.S.2d 587 (Fam. Ct. N.Y. Co. 1972), the court held that a mother who made no contacts with the child for over eighteen months and who moved without leaving a forwarding address, was sufficient to spell out an abandonment, and the custody of the three children in that case was committed to an authorized agency with the right to place them for adoption.

(e) In Matter of William S., N.Y.L.J. May 15, 1980, p. 12, col. 5,(Surrogate's Court, New York County) the court noted that the interest the mother had expressed subsequent to the commencement of the termination proceedings did not counteract or mitigate the finding of abandonment. The court noted:

"The mother has offered no explanation for her failure to visit or communicate with the infant or to consult in a meaningful way with the petitioner on the welfare of her child. This failure and the apparent failure of the putative father to make any gesture on the child's behalf evince "a settled purpose to be rid of all parental obligations and to forego all parental rights." (citation omitted)

The mother's belated attempt, made after the commencement of the proceeding herein, to reclaim the child on condition that the petitioner provide her with adequate accommodation and support does not counteract, nor should it here be allowed to mitigate, the effects of the finding of abandonment. The natural mother abrogated her parental obligations."

(f) But in In the Matter of Wesley L., 72 A.D.2nd 137, 423 N.Y.S.2d 482 (1st Dept. 1980), the court noted that the mere absence of visitation or contact with the child for a period of six months preceding the hearing was of itself not sufficient to establish abandonment; inquiry was to be made into the question of whether the failure occurred without good reason. Since the period of nonvisitation occurred in a context of otherwise uninterrupted contacts between the child and natural parents, and endeavors on the part of the parents to obtain the return of the child, which contacts and endeavors both preceded and succeeded the period of nonvisitation, a strong showing of active abandonment is required.

(2) There is a rebuttable presumption of the ability to visit and communicate with the child.

(a) Commuting distance is not a valid reason. In the case of In re Adoption of "Infant" G., 79 Misc.2d 731, 360 N.Y.S.2d 789 (Sur. Ct. N.Y.Co. 1974), reversed on other grounds sub nom. Goldman v. Goldman, 51 A.D.2d 282, 381 N.Y.S.2d 71 (1st Dept. 1976), affirmed sub nom. In re Adoption of Goldman, 41 N.Y.2d 894, 362 N.E.2d 619, 393 N.Y.S.2d 989 (1977), the respondent mother explained as "good reason" for her lack of visitation the discontinuance by the natural father of delivery of the child to her doorstep. The court did not excuse the parent for not visiting the child due to distance, when such distance was self-imposed. The court noted: "Not visiting one's child for three years when the only obstacle is commuting distance, does not constitute 'good reason.'" Id., at 793.

(b) In Matter of "J" Children, N.Y.L.J. May 1, 1980, p. 43, col. 1 (Fam. Ct. N.Y. Co.), the court noted that the mother's failure to visit due to her hospitalization out-of-state, and the agency's decision not to encourage visitation, does not constitute the active abandonment required for termination of parental rights, particularly in view of the mother's repeated expression of interest in the child. A permanent neglect cause of action would be more appropriate.

(c) In Matter of Dominique S.C., N.Y.L.J. January 14, 1980, p. 7, col. 4 (Surr. Ct. N.Y. Co.), the court held that the mother's claim of ignorance of the child's whereabouts without more, is not enough to prove the inability to visit or communicate under SSL §384-b(5). The court stated:

"At no time did the petitioner...discourage any of the interested parties, and the child's mother in particular, from communicating with Dominique or in any manner exercising parental rights. Instead, the petitioner, although not obligated to do so in an abandonment context, conducted a diligent, albeit fruitless search in both New York and Florida for the mother in the hopes of reuniting her with Dominique.... Under such circumstances, the mother' ability to visit and communicate is presumed....the mother's claims of ignorance of the child's whereabouts, without more, is simply not enough to prove an inability to visit or communicate under the statute.... New York public authorities could have and should have been contacted by Dominique's mother but were not. Allegations of lost telephone numbers and missing addresses will not suffice to excuse the mother's parental derelictions for one-and-a-half years. The alleged subjective intentions offered here to explain past conduct fail to convince the court of the intention of the mother to cure the mother's rejection of parental duties and rights."

(d) The fact that the parent is receiving public assistance does not demonstrate an inability to visit or communicate.

(e) Other situations involving inability to visit or communicate:

(i) SSL §384-b(7)(d) does not allow drug use or alcohol use as an excuse. In re Vanessa F., 76 Misc.2d 617, 351 N.Y.S.2d 337 (Sur. Ct. N.Y. Co. 1974).

(ii) Incarceration, institutionalization or hospitalization may toll the period. See Matter of "J" Children, supra.

(iii) Mental illness without hospitalization for that illness is not inability. In re Stephen B., 60 Misc.2d 662, 303 N.Y.S.2d 438 (Fam. Ct. N.Y. Co. 1969).

(iv) Inability to visit or communicate with the children through the transgressions of the parents is not sufficient. In re Anthony L. "CC," 48 A.D.2d 415, 370 N.Y.S.2d 219 (3rd Dept. 1975); but see however, In re Klug, 32 A.D.2d 915, 302 N.Y.S.2d 418 (1st Dept. 1969).

(3) Subjective intent, expressed or otherwise, standing alone, does not preclude a finding of abandonment.

(a) Unlike the situation in a permanent neglect case (SSL §384-b(7)(b)), evidence of some contact, although not substantial, may preclude a finding. Susan W. v. Talbot G., 34 N.Y.2d 76, 312 N.E.2d 171, 356 N.Y.S.2d 34 (1974).

(b) In the case of In the Matter of Vanessa F., 76 Misc.2d 617, 351 N.Y.S.2d 337 (Sur.Ct. N.Y.Co. 1974), the court stated

"At no time has either parent expressly consented to surrender this child for adoption. They urge that their conduct does not evidence an intention to part with their parental rights. I held that abandonment is not defined in terms of intention, but rather in terms of conduct such as the failure to visit a child for more than six months without good reason."

Note: The amendments to D.R.L. §111 and S.S.L. §384-b regarding abandonment, were designed specifically to overrule the "flicker of interest" test articulated in the Susan W. v Talbot G. case. Thus, it is possible to obtain an abandonment finding, even in the face of insubstantial contacts, so

long as concrete evidence of parental conduct evinces a parental intention to abandon. Cf., Matter of Corey L. v. Martin L., 45 N.Y.2d 383 (1978); Matter of Lance David H., 429 N.Y.S.2d 312 (3d Dept., 1980).

(c) In the Matter of William M. and Anthony M., N.Y.L.J., June 17, 1980, p. 12, cols. 1-2 (Sur.Ct. N.Y.Co.), the court noted:

"Respondent also claims that there has never been a 'wilful' abandonment: he seeks to characterize his behavior toward the infants as a mere 'surrender.' Such a contention is unreasonable in view of the fact that seven years elapsed during which time the respondent had no communication with the infants, made no provision for their support, and made no plans for their future. While it may well be true that it was never the respondent's intention to abandon the infants, (SSL §384-b(5)(b)) states explicitly that '(t)he subjective intent of the parent, whether expressed or otherwise, unsupported by evidence of...parental acts manifesting such intent, shall not preclude a determination that such parent has abandoned his or her child.' The outward behavior of the respondent permits no other conclusion than that there has in fact been an abandonment."

(d) Evidence of insubstantial or infrequent visits or communications shall not, of itself, as a matter of law, preclude a finding of abandonment. DRL §111(6)

(4) Diligent efforts by the agency to encourage the parent to visit and communicate with the child, are not required.

(a) In the case of In the Matter of St. Christopher's Home v. Longobardi, 40 N.Y.2d 96, 351 N.E.2d 707, 386 N.Y.S.2d 59 (1976), the Court of Appeals held that an authorized agency need not allege nor prove that it used diligent efforts to encourage and strengthen the parental relationship, when the agency seeks to gain legal custody of the child, based on abandonment by a proceeding pursuant to SSL §384. The Court stated:

"The degree of neglect should determine the route chosen to free the child and, if any agency can prove abandonment, i.e., prove that the parent failed to visit or support the child for six months without good cause, it is not also required to prove diligent efforts to encourage and strengthen the parental relationship." At p. 63.

(b) In the case of In re Malik M., 40 N.Y.2d 840, 356 N.E.2d 288, 387 N.Y.S.2d 835 (1976), the court held that in a statutory abandonment proceeding under the Social Service Law, an authorized agency charged with temporary foster care was not required to establish that it exercised diligent efforts to encourage and strengthen the parental relationship.

(c) See also Matter of William M. and Anthony M., supra.

(d) SSL §384-b(5)(b) codifies the holding in Matter of St. Christopher's Home v. Longobardi, supra.

(5) Failure to furnish support is significant, but not determinative on the issue of abandonment. Matter of Corey L. v. Martin L., 45 N.Y.2d 383, 408 N.Y.S.2d 439 (1978); see also DRL §111(6)(d).

c. A proceeding on the grounds of abandonment may be commenced in family court or surrogate's court.

(1) If the proceeding is brought in surrogate's court, the surrogate may, on the court's own motion, transfer the proceeding to the family court. In re Anonymous, N.Y.L.J., June 24, 1976, p. 13, col. 3 (Sur. Ct. Queens Co.)

(2) In Matter of V.S., 90 Misc.2d 139, 394 N.Y.S.2d 128 (Sur. Ct. N.Y. Co. 1977), the court stated that contested cases involving adoption of infants due to abandonment should not be tried in Surrogate's Court, except where necessary due to congestion and the inability to obtain services in the family courts.

d. Proof of the likelihood that the child will be placed for adoption is not required. SSL §384-b(3)(i)

e. The standard of proof in such proceedings is by a fair preponderance of the evidence. SSL §384-b(3)(g)

f. While a dispositional hearing is not statutorily required (Matter of Kimberly I., supra.) there is an increasing trend to read such a requirement into the law. See, e g., Matter of Wesley L., 72 A.D.2d 137 (1st Dept., 1980); In Re Maeru P., 104 Misc.2d 895 (F.Ct., N.Y.Co., 1980).

3. Parent(s) whose consent to adoption would otherwise be required are presently and for the foreseeable future unable, by reason of mental illness or mental retardation, to provide proper and adequate care for a child who has been in the care of an authorized agency for one year immediately prior to the commencement of proceedings. SSL s384-b(5)(c)

a. "Mental illness" means an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment, to such an extent that that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act. SSL §384-b(6)(a).

Testimony by a psychiatrist that the mother suffered from a mental illness described as manic depressive of a circular type, that the illness was characterized by periods of exacerbation during which times the mother would have difficulty in making judgments and could not care for the child, and that periods of remission could not be predicted with any degree of certainty in the future demonstrated that the mother was suffering from a mental disease to such an extent that the child would be in danger of becoming a neglected child if returned to her custody and thus required the granting of the county's guardianship petition. Matter of James S., 98 Misc.2d 650, 414 N.Y.S.2d 477 (Fam. Ct. Monroe Co. 1979).

b. "Mental retardation" means subaverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior to such an extent that if such child were placed in or returned to the custody of the parent, this child would be in danger of becoming a neglected child as defined in the family court act.

In a proceeding to commit guardianship of a person and custody of children to the commissioner of social services of the county because of the mental retardation of the mother, who contended that the requirement of clear and convincing proof of mental retardation had not been met, in that testifying experts, a psychiatrist and a psychologist, had been unable to establish that the retardation originated during the developmental period as required, the opinions of experts, in the absence of any other explanations of retardation, were sufficient to establish that retardation originated during the developmental period, and to shift the burden to establish otherwise to the mother. Matter of Audrey C., 71 A.D.2d 716, 419 N.Y.S.2d 209 (1979).

c. Alcoholism does not fall within the definition of mental health used in the provisions of this section dealing with guardianship proceedings. Matter of James S., supra.

d. Where mental retardation is alleged:

(1) the judge must order an examination and take the testimony of a physician and a certified psychologist. SSL §384-b(6)(c)(i)

(2) See also Matter of Ava Mario R., 98 Misc.2d 910, 414 N.Y.S.2d 982 (Fam. Ct. N.Y. Co. 1979). The court noted that if it could be foreseen that, with remedial and supportive services the parent could function as a mother, termination of her parental rights on the basis of mental retardation would not be warranted. The testimony of the certified psychologist who testified for the petitioner in the proceeings for termination of parental rights did not fall within the purview of an independent, disinterested psychological appraisal for the purposes of termination parental rights of the mother on the grounds of mental retardation. Proof adduced for the termination of parental rights of the mother was insufficient to support the allegation of mental illness as grounds for termination, absent any history thereof or finding of mental disorder by a court-appointed psychiatrist.

e. Where mental illness is alleged the judge must order an examination by a psychologist. SSL §384-b(6)(c)(e)

(1) In Matter of Hime Y., 52 N.Y.2d 242 (1981), the Court of Appeals reversed a mental illness (not a permanent neglect) termination finding, because of the insufficiency of expert evidence on the mother's mental condition in the "foreseeable future". Clinical evidence regarding the parent's prognosis, therefore, must be "clear and convincing", notwithstanding substantial evidence of past and even present mental inability to care for children. The court remanded the case to the Appellate Division for a determination on the separate permanent neglect issue, which had not been addressed on the merits by that court. In so doing, the Court held that the evidence of past and present mental illness, apart from periods of hospitalization, would not render a parent physically incapable of planning, under the terms of S.S.L. 384-b(7)(d). In discussing Matter of Hime Y., therefore, it is necessary to separate its holding regarding the sufficiency of evidence under the mental illness cause of action from its quite distinct conclusion regarding physical inability under the permanent neglect (failure to plan) cause of action.

f. The parent and the authorized agency have the right to submit other psychiatric, psychological or medical evidence. SSL §384-b(6)(e)

(1) The exercise of the parent's statutory right to submit other psychiatric, psychological or medical evidence is not dependent on the parent's financial ability. Matter of Roth, 97 Misc.2d 834, 412 N.Y.S.2d 568 (Fam. Ct. Monroe Co. 1974).

g. If an examination is hindered by the parent's departure from the state, or by concealment, the appointed physician, psychiatrist or psychologist may testify on the basis of other available information provided a reasonable basis is afforded for such opinion by the information. SSL §384-b(6)(e)

h. The standard of proof is by clear and convincing evidence. SSL §384-b(3)(g)

(1) The legal sufficiency of proof shall not be determined until the judge has taken the testimony of the physician, psychiatrist or psychologist.

(2) In the Matter of Daniel Aaron D., 49 N.Y.2d 788, 426 N.Y.S.2d 729 (1980), the court held that the conflicting testimony of the psychiatrists did not constitute clear and convincing proof of the mother's mental illness. Further, the court noted that it was error to exclude the mother from the courtroom during the psychiatrist's testimony.

(3) The court, in the case of In re Bradley U., 55 A.D.2d 722, 389 N.Y.S.2d 431 (3rd Dept. 1976), held that the evidence warranted termination of the natural mother's parental rights since there was clear and convincing proof of her mental illness.

(4) In the Matter of Joan R., 61 A.D.2d 1108, 403 N.Y.S.2d 368 (3rd Dept. 1978), the court stated:

"Expert testimony at the trial by...a psychiatrist establishes by clear and convincing evidence that the appellant suffers from mental illness...and that, as a result of said illness, she is unable now and will likely remain unable in the future to properly care for a child."

The court affirmed the order terminating parental rights, based on the mental illness of the parent.

(5) The finding of the family court that guardianship and custody rights of the mother should be transferred to the county department of social services on the ground of mental illness of the mother was against the weight of evidence, and there was no support for a termination of parental rights based on mental illness. Matter of Mark "GG," 69 A.D.2d 311, 419 N.Y.S.2d 275 (3rd Dept. 1979).

i. There is no right to a jury trial. Matter of Everett S., 62 A.D.2d 1069, 403 N.Y.S.2d 803 (3rd Dept. 1978).

j. In a proceeding to terminate parental rights based on mental retardation or mental illness, there is no requirement for the agency to prove diligent efforts to strengthen the parental relationship. See In re Everett S., supra.

k. The family court has exclusive jurisdiction over proceedings commenced on these grounds. SSL §384-b(3)(d)

l. A dispositional hearing is not reguired.

(1) The Appellate Division, Second Department, affirmed an order of the family court committing the child to the custody of the Commissioner of Social Services

and empowering him to consent to the adoption of the child without notice to or consent of the child's mother. In so holding, the court rejected the mother's contention that the family court had erred in not holding a dispositional hearing. "Where termination of parental rights is adjudicated upon a finding of mental illness, under section 384-b (subd. 4, par.(c)) of the Social Services Law, a dispositional hearing is not mandated." In re Jennifer R., N.Y.L.J., April 16, 1981 p. 11 col.2

(2) While a dispositional hearing is not required, there is an increasing trend to read a dispositional hearing requirement into the law. See, e.g., Matter of Daniel Aaron D., N.Y.L.J., October 2, 1980. This issue, along with the related constitutional issues, is currently pending on appeal in the Cardinal McCloskey Home v. Mendes, N.Y.L.J., Sept. 2., 1980, p.11, col, 6

(3) In Matter of the N. Children, ___Misc.2d___, 435 N.Y.S.2d 1018 (Fam.Ct. Kings Co. 1981) the court noted that where termination of parental rights is sought on the ground of mental illness, the best interests of the children require a dispositional hearing which is within the court's discretion.

m. Constitutionality

(1) In the case of In the Matter of Everett S., supra the court held that the statute which terminates parental rights under the grounds of mental illness, was constitutional. The court said:

"The primary contentions of the appeallant on this appeal are (1) that the former subdivision 7 of Section 384 of the Social Services Law was unconstitutional and (2) that the record does not support the disposition of the trial court. Neither claim has merit. The former subdivision 7 of section 384 of the Social Services Law, under which the trial court ordered that the guardianship and custody of Bonnie and Brenda A be committed to respondent, provided that such order could be made without the consent of the parent provided a showing of mental illness or mental retardation had been made. Paragraph (c) of subdivision 7 of the same section provided: 'Mental retardation' means subaverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a negelected child as defined in the family court act.' This statute has been enacted in essentially the same terms as section 384-b (subd. 6, par (b)) of the Social Services Law. The first constitutional challenge is that a finding of mental retardation under the statute violated appellant's right to trial by jury.

Appellant has cited no authority indicating that this State has ever recognized a right to a jury trial on the issue of mental competence apart from a case, such as Sporza v. German Sav. Bank, (192 N.Y. 8), where such finding would result in a deprivation of physical liberty (cf. NY Const, Art I, §2). We believe that the procedures of the former section 384 of the Social Services Law fully afforded to appellant her due process rights. The claim that the subject statute is unconstitutionally vague is, from a reading of the language, without merit. The final constitutional argument is that the former section 384 of the Social Service Law required a finding by the trial court, absent in this case, that the respondent had made diligent efforts to strengthen the parental relationship or shown that such efforts would have been detrimental to the children. This argument is met by Matter of Anonymous (St. Christopher's Home) (citation omitted) which laid to rest any argument that this requirement, applicable to neglect proceedings under article 6 of the Family Court Act, also applied to proceedings under section 384 of the Social Services Law." Id., at 1069-70.

(2) See also Matter of Daniel A.D., N.Y.L.J. October 2, 1980, p. 7, col. 5 (Fam. Ct. N.Y. Co.)

(3) In Matter of Ursula P., Denise P., N.Y.L.J. March 30, 1981, p. 14, col. 4, (Fam. Ct. Kings Co.), the court denied the respondent mother's motion to dismiss a petition to terminate parental rights due to mental illness on the grounds that SSL §384-b was unconstitutional. In so holding, the court stated "...(T)here is is no constitutional requirement of proof that a termination of parental rights is in the best interests of the child, be at a separate dispositional hearing."

(4) There are, however, opposing lower court decisions concerning the constitutionality:

(a) Cardinal McCloskey School and Home v. Mendes, N.Y.L.J. September 2, 1980, p. 11, col. 6. The court stated:

"In summary, SSL section 384-b violates the constitutional rights of respondent-mother solely because of her mental illness and by intervening into the constitutionally protected rights of both parent and child beyond what is necessary to meet the state's interest."

(b) In Matter of Gross, 102 Misc.2d 1073, 425 N.Y.S.2d 220 (Fam. Ct. N.Y. Co. 1980) the court made the following arguments in declaring the statute unconstitutional:

"The loss of a child is 'as onerous a penalty as the deprivation of the parents' freedom.' (citation omitted) In Powell v. Texas (citation omitted), the issue was whether a state could constitutionally impose a criminal penalty for public drunkenness. While a plurality held that Robinson v. California (citation omitted) protected a person who suffered from a disease but did not prevent punishment for criminal acts, a majority of the Supreme Court agreed that it was unconstitutional to punish conduct arising from a disease.... the Supreme Court in its discussion specifically analogized mental illness with alcoholic addiction in invalidating a statute which provided criminal penalties for mere status. The Court suggested that a state might deal with such human afflications by compulsory treatment but could not consider the status itself an offense.

It is unlikely that any State at this moment...would attempt to make it a criminal offense for a person to be mentally ill....in the light of contemporary human knowledge, a law which made it a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments....

This Court had little doubt that the due process clause would be offended '(i)f a state were to attempt to force the break-up of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' (citation omitted)

The issue was once again raised in Caban v. Mohammed (citation omitted), but not reached in deciding the case. However, the Court noted--'Finally, appellant argues that he was denied substantive due process when the New York courts terminated his parental rights without first finding him to be unfit to be a parent....Because we have ruled that the New York statute is unconstitutional under the Equal Protection Clause, we similarly express no view as to whether a state is constitutionally barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit.'

The New York Court of Appeals in its decision on termination of parental rights has consistently rejected the 'best interests of the child' as the sole criteria (sic) for termination. In its delineation of extraordinary circumstances, the Court has clearly identified the appropriate critera as 'surrender, abandonment, persisting neglect, unfitness and unfortunate or involuntary disruption of custody over an extended period of time.' (citation omitted) The Court of Appeals also noted in that case:

'Extraordinary circumstances alone do not justify depriving a natural parent of the custody of a child. Instead, once extraordinary circumstances are found, the court must then make the disposition that is in the best interest of the child.... while it is true that disruption of custody over an extended period of time is the touchstone in many custody cases, where it is voluntary the test is met more easily but where it is involuntary the test is met

only with great difficulty, for evident reasons of humanity and policy.' (citation omitted)

Facially, Section 384-b of the Social Services Law as applied to a 'mentally ill or mentally retarded' respondent makes no provision for a dispositional hearing. Mental illness or retardation is equated with abandonment which never requires determination of the best interests of the child. However, under the 'permanent neglect' provisions of the statute, the Court is mandated, even after a finding of neglect, to then separately deal with the disposition based solely on the best interests of the child....There is obviously a drastic disparity in treatment of the mentally ill and mentally retarded parents whose rights are immediately terminated by a finding of mental illness or mental retardation and their consent to any future adoption dispensed with while a neglectful or abusing parent is entitled to a separate hearing on the issue of the child's best interests before there can be a termination of such a parent's rights.

It appears to this Court that the state should not have it both ways. Either the best interests of the child shall govern and a dispositional hearing mandated in all cases or there shall be an automatic termination for fault in all cases, including neglect and abandonment....this statute as applied to these respondents violates their constitutional rights by depriving them of their children solely because of their mental illness and mental retardation. The statute denies the Court the right to inquire as to the children's adoptability even though this is the alleged reason for for the termination of parental rights. The failure of the legislature to provide for a dispositional hearing in the case of mentally ill or mentally retarded parents violates the procedural and substantive due process rights of these respondents in that it punishes them for their status as mentally ill or mentally retarded."

n. Proof of the likelihood that the child will be placed for adoption is not required. SSL §384-b(3)(i)

o. Evidence, if otherwise admissible, is not excluded because of privilege attaching to confidential communications between:

(1) husband and wife;

(2) physician and patient;

(3) psychologist and client;

(4) social worker and client. SSL §384-b(3)(h)

IV. Proceedings to terminate parental rights where the child is a permanently neglected child. SSL §384-b(7)(a)

A. Jurisdiction and venue

1. The family court has exclusive jurisdiction over proceedings based on the permanent neglect of the child. SSL §384-b(3)(d)

2. Venue is:

a. the county in which the child resides or is domiciled at the time of the filing of the petition; or

b. in the county in which the parent of the child resides or is domociled; or

c. in the county in which the authorized agency has an office for the regular conduct of business. SSL §384-b(3)(c)

B. Definitions

1. "Permanently neglected child" is defined supra, p. 5.

2. Evidence of insubstantial or infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child. A visit or communication by a parent with the child which is of such character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be be deemed a substantial contact. SSL §384-b(7)(b)

3. "To plan for the future of the child" shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan shall be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent. SSL §384-b(7)(c)

a. A parent shall not be deemed unable to maintain contact with or plan for the future of the child by reason of such parent's use of drugs or alcohol, except while the parent is actually hospitalized or institutionalized therefor. SSL §384-b(7)(d)(i)

b. A parent shall be deemed unable to maintain contact with or plan for the future of the child while the parent is actually incarcerated. SSL §384-b (7)(d)(ii)

c. The time during which a parent is actually hospitalized, institutionalized or incarcerated shall not interrupt, but shall not be part of, a period of failure to maintain contact with or plan for the future of a child. SSL §384-b(7)(d)(iii)

4. Evidence of diligent efforts by an agency to encourage and strengthen the parental relationship shall not be required when the parent has failed for a period of six months to keep the agency apprised of his or her location. SSL §384-b(7)(e)

5. "Diligent efforts" shall mean reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between the parent and child, including but not limited to:

a. consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family;

b. making suitable arrangements for the parents to visit the child;

c. provision of services and other assistance to the parents so that problems preventing the discharge of the child from care may be resolved or ameliorated;

d. informing the parents at appropriate intervals of the child's progress, development and health. SSL §§384-b(7)(b)(1), (2), (3), (4)

C. Constitutionality of the statute

This statute has been attacked on two basic constitutional grounds:

1. that it violates the equal protection clause of the Fourteenth Amendment of the United States Constitution.

In Matter of Carl and Annette N., 91 Misc.2d 738, 398 N.Y.S.2d 613 (Fam. Ct. Schenectady Co. 1977), the court rejected the argument that the statute treats similarly-situated persons differently and thus violates the equal protection clause of the Fourteenth Amendment. The court noted:

"...The basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discreet and objectively identifiable classes. And with respect to such legislation, it has long been settled that the Equal Protection Clause is offended only by laws that are invidiously discriminatory--only by classifications that are wholly arbitrary or capricious. In fact, this statute itself does not create any class of parents whatsoever, but deals with a class of children, and respondents and other parents only become affected by the statute through their own actions, since a child under New York law may only come under the care of an authorized agency through the neglect, abuse or abandonment of the child (under Article 10 of the Family Court Act), or through voluntary transfer of the child into foster care (under Section 384-a of the Social Services Law)."

2. that it violates the due process clause of the Fourteenth Amendment of the United States Constitution.

a. The "planning" requirement of the statute does not violate the due process clause of the Fourteenth Amendment. In Matter of Carl and Annette N., supra, the court noted that the statute "permits an adjudication of permanent neglect solely on the basis of failure to plan irrespective of the qualitative and quantitative substantiality of continued contacts with the child by the parents."

The respondent's argument was that the requirement to "plan" is fatally indefinite, and fails to give parents adequate notice of what they must do to avoid losing parental rights. It further permits arbitrary, capricious and discriminatory application by the courts and the social agencies.

The court replied to these allegations as follows:

"It is a well-settled principle of Constitutional law that an authoritative construction of a state statute by its courts must be considered and is binding in any attack on the statute for vagueness (citation omitted). As so construed, the requirement of a parent to substantially plan means not only to formulate,but also to accomplish a feasible and realistic plan to restore the child to a permanent stable home with its parents....As so construed, the statutory phrase in question more than adequately satisfied the constitutional requirement for definiteness under the due process clause. To make the 'planning provision' as definite as (the parents suggest) would require a detailed recital of every conceivable program of personal economic, residential and social rehabilitation that might tend to accomplish the goal of restoration of children to a wholesome, permanent home environment with their parents. Such a recital, if not impossible to accomplish, at least would produce a situation of such complexity and prolixity that it would defeat the process of both practical implementation and fair notice to those affected. Such definiteness is not constitutionally required under the vagueness doctrine by the Supreme Court, even when dealing with statutes imposing criminal sanctions or restricting First Amendment rights of free expression or political activity... As construed by New York Courts, the statute in plain language conveys to parents their duty to participate in the formulation of a program of action which will realistically tend to accomplish the desired goals of the statute, namely, the return of the child to their custody with adequate care on a permanent, stable basis."

b. The statute does not violate the due process clause of the Fourteenth Amendment by requiring proof only by a fair preponderance of the evidence.

(1) In Matter of Pedro Orzo, 84 Misc.2d 472, 374 N.Y.S.2d 554 (Fam. Ct. N.Y.Co. 1975), the court said:

"Respondent...argues that the petition herein must be dismissed unless the allegations therein are proved beyond a reasonable doubt. Respondent submits that Section 622 of the Family Court Act, in so far as it provides for proof by a fair preponderance of the evidence in permanent neglect proceedings, fails to meet the due process standards of the Fourteenth Amendment of the United States Constitution." .

The court's response to such allegations was as follows:

"The purpose of the permanent neglect statute is not punitive, even though a neglectful parent may suffer. The statute is remedial in nature, designed to rescue children from being 'left in a state of uncertainty by being legally chained to parents who give little hope of ever acting as parents (citation omitted).' Section 622 of the Family Court Act along with other provisions of Article 6 of the Family Court Act is the result of a legislative balancing of competing interests....No cases have been brought to the court's attention in which the 'beyond a reasonable doubt' standard has been applied except where loss of liberty might result."

(2) In Matter of John "AA," 75 A.D.2d 910, ___ N.Y.S.2d ___ (3rd Dept. 1980), the appellants argued that the statute was unconstitutional because the standard was so low that it deprives them of due process. The court held:

"(W)e note that the permanent neglect statute (citation omitted) recognizes and seeks to balance rights possessed by the child (citation omitted) with those of the natural parents (citations omitted). Accordingly, application of the preponderance of evidence standard in such a proceeding involving these often conflicting rights is proper and constitutional."

D. Procedures

1. The proceeding is originated by a verified petition which must allege:

   a. that the child is under 18 years of age;

   b. that the child is "in the care of" an authorized agency for more than one year.

      (1) In the care of an authorized agency can be either an institution or a foster home.

      (2) It is no longer necessary that the child be placed with or committed to the care of an authorized agency. It is sufficient if the child is in the care of such an agency.

      (3) The legality of the initial placement is not relevant to the initiation of a permanent neglect proceeding. In Matter of Amos H.H., 59 A.D.2d 795, 398 N.Y.S.2d 771 (3rd Dept. 1977) the court said:

      "Whether or not...dispositional hearings were held at the time of the original order awarding custody of the children to the (Department) is not dispositive of the issue at bar. To permanently terminate a parent's custody of a child pursuant to Family Court Act §614, a petition alleging that the child is in the care of an authorized agency is required. The requirement of an allegation that the child has been placed in the care of an authorized agency was deleted from that Section in 1975 (L. 1975, ch. 700). It is the opinion of this court that the Legislature intended to necessitate only that the child be in the care of an authorized agency, without regard to the legality of the process through which the child came into such care. Consequently, the legality of the child's placement in foster care is irrelevant in this proceeding."

      (4) In Matter of Mickey B., 65 A.D.2d 603, 409 N.Y.S.2d 504 (2d Dept. 1978) the court said:

"The requirement that the child had to be 'placed'...into the care of the agency was deleted from (the statute) in 1975....It can therefore be assumed that the Legislature intended only that the child be in the care of the agency, without regard to the circumstances behind his placement."

c. that the agency has made diligent efforts to encourage and strengthen the parental relationship and specifying the efforts made or that such efforts would be detrimental to the moral and temporal welfare of the child and specifying the reasons therefor.

d. that the parent, notwithstanding the agency's efforts, has failed for a period of more than one year following the date such child came into the care of an authorized agency, substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so.

e. that the best interests of the child require that the guardianship and custody of the child be committed to an authorized agency or to a foster parent. FCA §§611, 614

Note: Where the petitioner is not the authorized agency, allegations in the petition relating to the efforts of the authorized agency may be made upon information and belief. FCA §614(2)

2. Parties who may originate the proceedings

a. An authorized agency. SSL §384-b(3)(b); defined SSL §371(10) and supra, p. 1; FCA §119

b. A foster parent. SSL §384-b(3)(b); see SSL §392(7)(c); FCA §1055(5)

3. Issuance of summons and service

a. On the filing of a petition, the court will cause a copy of the petition and summons to be issued, requiring the parent to show cause why the court should not enter an order committing the guardianship and custody of the child to the petitioner for the reason that the child is permanently neglected. FCA §616

b. Service of the summons under FCA §617

(1) Service of a summons and petition shall be made by delivery of a true copy thereof to the person summoned at least twenty days before the initial court appearance. If so requested by the parent or other person legally responsible for the child's care, the court may extend the time for appearance and answer.

(2) If after reasonable effort, personal service is not made, such substituted service or service by publication as may be ordered by the judge shall be sufficient.

(3) Personal service within or without the state or in a foreign country shall be made in accordance with the provisions of section three hundred seven of the surrogate's court procedure act, as the same may be amended from time to time, with respect to service of a citation.

(4) Service of the petition and other process by publication shall be made in accordance with the provisions of CPLR §316, provided, however, that a single publication in only one newspaper designated in the order shall be sufficient.

(5) In Matter of Andre J., 75 A.D.2d 600 , 426 N.Y.S.2d 822 (2d Dept. 1980) the court indicated that the family court had abused its discretion in dismissing petitions to terminate parental custody and to obtain guardianship of three children for failure to perfect service within applicable periods, where the applicable period was set pursuant to a precatory guideline and where petitioner's failure to perfect service occurred solely through an error on the part of the newspaper in which publication of service was to be made.

4. Evidence in the proceeding

a. The court must determine whether the allegations in the petition are supported by a fair preponderance of the evidence. FCA §622; see supra, p. 52 ff.

b. Only competent, material and relevant evidence may be admitted in a fact-finding hearing to prove permanent neglect. Evidence of parental contact or of the failure to maintain contact with the child subsequent to the date of the filing of the petition is inadmissible in the fact-finding hearing. FCA §624. It is admissible but not dispositive at disposition.

(1) In Matter of Diana S., 68 A.D.2d 915, 414 N.Y.S.2d 197 (2d Dept. 1979), the court held that consideration during the fact-finding hearing of events or developments subsequent to the filing of the petition was reversible error.

(2) In Matter of Tina X.X., 52 A.D.2d 975, 424 N.Y.S.2d 53 (3rd Dept. 1980), the appellate court noted that the "factual findings are not supported by competent evidence on the record."

c. Evidence at the dispositional hearing need only be material and relevant. Hearsay is admissible. FCA §624

d. Evidence of parental contact or of failure to maintain contact with the child subsequent to the filing of the petition is admissible at the dispositional hearing, but cannot as a matter of law preclude or require an order committing the guardianship of a child. FCA §624

e. Reports prepared by the probation service or a duly authorized agency for use by the court prior to the making of an order of disposition shall be deemed confidential information furnished to the court which the court in a proper case may, in its discretion, withhold from or disclose in whole or in part to the law guardians counsel, party in interest, or other appropriate person. Such reports may not be furnished to the court prior to the completion of a fact-finding hearing, but may be used in a dispositional hearing.

f. See also Matter of Leon R.R., 48 N.Y.2d 117, 421 N.Y.S.2d 863 (3rd Dept. 1979).

E. Hearing

1. The hearing in a permanent neglect case is bifurcated.

a. In such proceedings, the FCA §625 requires separate fact-finding and dispositional hearings.

(1) Fact-finding is held to determine whether the allegations of the child's age and placement, the agency's diligent efforts and the parent's failure to maintain contact or plan, have been proven. FCA §622. The dispositional hearing is held to determine what order of disposition is in the child's best interests. FCA §623

(2) Dispositional hearings may commence immediately after the required findings are made.

(3) After the fact-finding hearing and after the required findings are made, the court may adjourn the dispositional hearing to enable it to make inquiry into the surroundings, conditions and capacities of persons involved in the proceedings. FCA §626(b)

(4) The court, for good cause shown, on its own motion or on the motion of the child or a party, may adjourn the fact-finding or dispositional hearing. FCA §626(a)

(5) On the consent of all parties, the court may dispense with the dispositional hearing and make a disposition based on competent evidence admitted at the fact-finding. FCA §625(a)

(6) The court must hold a dispositional hearing. In re Denlow, 87 Misc.2d 410, 384 N.Y.S.2d 621 (Fam. Ct. Kings Co. 1976); see also In re Roy Anthony A., 59 A.D.2d 662, 398 N.Y.S.2d 277 (1st Dept. 1977).

(6) No particular formality is required in the dispositional hearing. It is sufficient if the court offers the opportunity to present evidence as to disposition. In re Benya, 54 A.D.2d 879, 389 N.Y.S.2d 1 (1st Dept. 1976).

b. No similar requirement of separate hearings appears to exist with respect to guardianship proceedings based on grounds other than permanent neglect, since in a permanent neglect case, the court has dispositional alternatives (FCA §631) which are not available where the finding is made on other grounds.

2. Discovery

a. Prior to the fact-finding hearing, counsel for the parent should serve a notice of discovery and inspection upon the attorney for the agency, to review the agency's case records. See supra pp. 31,32

b. The agency may make a motion for a protective order limiting the scope of the disclosure if the agency believes that the discovery and inspection of its records if the records will lead to the disclosure of confidential material which should not be disclosed.

3. The agency's case

a. Generally, witnesses are case workers and agency case supervisors.

b. The agency will try to lay a foundation for the admission of the agency case records in compliance with CPLR §4518. The case supervisor should identify the case records and testify that:

(1) it is in the regular course of agency business to keep such records;

(2) these particular records were made in the regular course of business;

(3) the entries were made contemporaneously with the events discussed or described. Note, however, that a permanent record prepared months after the event may nevertheless be admitted into evidence if the record was transcribed in the regular course of business from contact cards or other notes made contemporaneously with the events. Matter of "Male" G., 97 Misc.2d 283, 411 N.Y.S.2d 172 (Fam. Ct. N.Y. Co. 1978);

(4) the records were kept under the supervision and control of the caseworker;

(5) see also Matter of Leon R.R., supra.

c. The petitioner will try to show that:

(1) the parent or custodian failed for more than one year after the child came in to care substantially and continuously or repeatedly to maintain contact with the child although physically and financially able to do so; or

(2) the parent or custodian failed for more than one year substantially and continuously to plan for the future of the child although physically and financially able to do so.

(3) In cases where a parent has defaulted, physical and financial ability "shall be presumed," although such presumption would undoubtedly be rebuttable. In light of Matter of Hime Y., supra, it is arguable that periods of hospitalization for physical reasons or for drug or alcohol usage, but not for mental reasons, are excludable from the applicable one year period of failure to plan or contact. Advocates for parents, who have been hospitalized for mental reasons, nevertheless should argue against this construction as overly broad and beyond the express terms of the decision. Hime Y. clearly modified Klug and James S., however.

d. A parent or custodian cannot be charged with failing to fulfill parental obligations under FCA §614(d) or SSL §§384-b(7)(a),(b),(c) during any period of time where the parent was physically unable to fulfill the obligations.

(1) A parent shall be deemed unable to maintain contact with or plan for the future of the child for any period of time when the parent is actually hospitalized, incarcerated or institutionalized. SSL §384-b(7)(d)

(2) A failure to maintain contact or plan for the future of the child will be excused if the parent's "powers of locomotion" are otherwise impaired. See Matter of Stephen B., 60 Misc.2d 662, 303 N.Y.S.2d 438 (Fam. Ct. N.Y. Co. 1969), affirmed sub nom. Matter of Behrman, 34 A.D.2d 527, 308 N.Y.S.2d 864 (1st Dept. 1969), as by illness or injury.

In Matter of Klug, 32 A.D.2d 915, 302 N.Y.S.2d 418 (1st Dept. 1969), Justice Telzer noted in his concurring opinion:

"The words 'although physically and financially able to do so' also require an interpretation in the light of their use in the statute. Physical inability might arise from incarceration of a parent or it might result from hospitalization due to injury or the presence of mental or physical ailments which prevent a mother from exercising her parental obligation."

(3) A parent is not deemed unable to maintain contact with the child because of her use of drugs or alcohol, except if the parent is actually hospitalized or institutionalized for such use. SSL §384-b(7)(d)(i)

(i) In Matter of James S., 98 Misc.2d 650, 414 N.Y.S.2d 477 (Fam. Ct. Monroe Co. 1979), the court stated:

"It is quite apparent...that the (father) suffers from severe alcohol addiction, and, indeed, the Court finds that he has completely failed to plan for the future of his child because of alcoholism. Nevertheless, a parent is not deemed unable to plan...by reason of the use of alcohol."

The court further noted that although the father was hospitalized and then released to a halfway house ("what the court does not consider a hospital") and then rehospitalized on two subsequent occasions, the statutory period of failure to plan for one year had been met. The court continued:

"It may be contended that the period of time between November 17, 1976 and November 1, 1977, together with the fact of seven days' hospitalization in February, fails to meet the statutory requirement of a failure to plan for a period in excess of one year. However, there was

some testimony introduced by the petitioner that both respondents were living together in the months of September and October, 1973,...The court finds that the...period in excess of one year, although interrupted, has been met."

(ii) Concerning the "tacking together" of periods, see also Matter of Sonia Vanessa R., 97 Misc.2d 694, 412 N.Y.S.2d 257 (Fam. Ct. N.Y. Co. 1978), affirmed 74 A.D.2d 1009, 421 N.Y.S.2d 863 (1st Dept. 1980); Matter of Anthony L. "CC," 48 A.D.2d 415, 370 N.Y.S.2d 219 (3rd Dept. 1975); and contra Matter of Thomas "TT," 67 A.D.2d 788, 412 N.Y.S.2d 482 (3rd Dept. 1979).

(iii) In In re Vanessa F., 76 Misc.2d 617, 351 N.Y.S.2d 337 (Sur. Ct. N.Y. Co. 1974), although the termination of parental rights was based on abandonment, the court noted:

"It is obviously not 'good reason' for parents to fail to visit their child for two years, that they were narcotic addicts at the time when the child was born."

(iv) In Matter of Davina M., 68 A.D.2d 531, 417 N.Y.S.2d 712 (1st Dept 1979), the court said:

"The mother was addicted to barbiturates and methadone during the period since the child first entered into the care of the agency. During that period, the mother was hospitalized on at least five occasions for drug overdoses and she has entered and left a number of drug programs. On most occasions when she visited the child or saw the social worker at the agency, she was obviously under the influence of drugs....(T)he court finds that...the mother has failed...to plan for the future of the child, although physically able to do so."

(4) Mental illness: earlier decisions have refused to equate physical ability with mental ability. In In the Matter of Stephen B., 60 Misc.2d 662, 303 N.Y.S.2d 439 (Fam. Ct. N.Y. Co. 1969), the court noted:

"It is clear therefore that the omission of such a term as 'mentally,' 'emotionally,' or 'physically' from the proviso as to a mother's ability to contact her child was deliberate, and that 'physically able' is to be construed literally to refer to powers of locomotion. Accordingly, during periods when Miss B. was not hospitalized she will be deemed to have been physically able to maintain contact with her child."

More recent cases indicate that the "ability to plan" necessitates the use of a person's mental faculties. In In the Matter of James S., supra, the court noted:

"The court is aware that the term 'physically' has been interpreted literally to apply to powers of locomotion.(citation omitted). However, this case was decided prior to the 1973 amendment, which permitted a finding of permanent neglect based upon failure to 'maintain contact with or plan for the future of the child.' In other words, the Legislature amended the law to make the requirements of a failure to maintain contact and the failure to plan for the future of the child in the disjunctive, rather than the conjunctive. The concept of failure to plan for the future necessarily includes the use, or perhaps more accurately the lack of use, of a person's mental faculties. In this proceeding...the respondent-mother, by reason of her mental illness, was unable to plan for the future of her child."

(i) Similarly, see Matter of Gross, 102 Misc.2d 1073, 425 N.Y.S.2d 220 (Fam. Ct. N.Y. Co. 1980.

(ii) See also Matter of Hime Y., 73 A.D.2d 154, 425 N.Y.S.2d 336 (1st Dept. 1980), reversed 52 N.Y.2d 242, --- N.Y.S.2d --- (1981). The Appellate Court found, contrary to the trial judge in family court, that the mother was mentally ill, and, commenting on the petitioner's alternative cause of action for permanent neglect, noted:

"Since the mother has been found 'mentally ill,' it necessarily follows that she was not 'physically able' to plan...(and) the cause of action based on 'permanent neglect' must be dismissed."

The Court of Appeals, in reversing, noted:

"Nothing in the statutory definition of a permanently neglected child refers to 'mental illness' of the parent; the only stated qualifications for the requirement of planning for the child's future are that the parent be 'physically and financially' able to do so. We do not read that language as encompassing mental condition or status, nor do we, as did the Appellate Division, equate mental and physical capacity (citation omitted). Indeed, it may be contended that most natural mothers who fail to plan for their own children are subject to some form of mental disturbance; if mental inadequacy were to be considered an acceptable excuse for failure to plan the scope of the statutory provision would be narrowed to a point of near practical uselessness. Mental illness of a parent as a basis for terminating parental rights is treated specifically and in detail in other sub-divisions of section 384-b; if it had been the legislative intention that mental

illness was also to serve as an excuse for a failure to plan for the child's future it could easily have been so provided in paragraph (a) of subdivision 7. That it was not, in face of other provisions treating the condition, leads us to conclude that the statute is to be literally applied, and that mental illness does not, ipso facto, establish physical disability exonerating a parent from the obligation to plan for her child."

The Court added in a note:

"It may not be without significance that by explicit provisions of the statute, the parent's use of drugs or alcohol (which might be said at least in some instances to impair the ability to plan for the future of the child) shall not excuse from the obligation to plan 'except while the parent is actually hospitalized or institutionalized therefor' (Social Services Law §384-b subd 7, par (d), clause (i))."

e. A parent cannot be faulted for failing to fulfil parental obligations during any period when that parent was financially unable to do so.

(1) In Matter of "TT," 67 A.D.2d 788, 412 N.Y.S.2d 482 (3rd Dept. 1979), the court reversed a termination order, noting among other reasons that the father was destitute:

"(The) father is destitute. He lives in an old school bus...and he has no car or other means of transportation. His monthly income is approximately $60....He was...unable to drive because he had lost his license. Accordingly, petitioner has failed to sustain its burden of establishing that (the)...father was physically and financially able to maintain contact with and plan for the future of Thomas."

(2) In In re Anthony L., 48 A.D.2d 415, 370 N.Y.S.2d 219 (3rd Dept. 1975), there was no evidence that the mother was financially able to visit and plan for the child. But the court still terminated all her parental rights, noting:

"The troublesome part of the statute as to the present facts is the ability of the parent, physically and financially, to provide for the child. The record does not establish affirmatively that the mother was physically or financially able to so provide, but that such failure was the direct result of her own transgressions and while the statute speaks affirmatively, the purpose thereof should not be defeated by negative action and considering the facts in this proceeding, the intent and purpose of the statute has been satisfied."

(3) Dependence on public assistance does not as a matter of law preclude the court from finding a parent is financially able to fulfill the parental obligations.

(a) In Matter of Karas, 59 A.D.2d 1022, 399 N.Y.S.2d 758 (4th Dept. 1977), the court noted:

"The assertion of financial inability clearly lacks merit. Although respondent was a recipient of public assistance, she could have made arrangements to visit and communicate with her children."

(b) In Matter of Orzo, supra, the court said:

"The issue of respondent's financial ability to care for the children was not raised and it is assumed here, as in many permanent neglect cases, that a mother on public assistance does not lack financial ability under FCA §614(1)(d)."

(c) The court, in In re John W., 63 A.D.2d 750, 404 N.Y.S.2d 71 (3rd Dept. 1978), noted in a memorandum decision that:

"...absent evidence that a parent is receiving an inadequate amount of public assistance does not automatically excuse that parent from substantially planning for the future of a child. There was no proof in the present case that respondents were receiving inadequate public assistance."

(d) But in In the Matter of Santosky, 89 Misc.2d 730, 393 N.Y.S.2d 486 (Fam Ct. Ulster Co. 1977), affirmed on other grounds sub nom. Matter of John W., 63 A.D.2d 750 (3rd Dept. 1978); and Matter of John "AA," supra, the trial court refused to find permanent neglect where the parents received full public assistance, including food stamps and Medicare. The father was unemployed and without income or other financial resources. The court said:

"However, it would take a strained construction indeed of the phrase 'financially able to do so' to include as a financial resource public assistance, which for the foreseeable future is the (parents') only source of income. Their very eligibility for full public assistance presupposes that they are 'financially unable.'
Consequently, the (parents') failure to plan for the future of their children is to be excused...by their poverty. A welfare budget presumably provides for the (parents') current minimal needs, but makes no allowance for financing plans for the future. The Social Services Department would fault these parents for their failure to plan for the children's future, yet will not provide them with the financial resources to do so....'The destruction of the poor is their poverty,' but they should not suffer the permanent loss of their children because caught up in this 'Catch-22' situation."

On appeal of the case, the Appellate Division sustained the lower court's decision, but made the following comment on the trial judge's interpretation of the financial ability requirement:

"(I)t was concluded by the court that since respondents were eligible for full public assistance, they were financially unable to substantially plan for the future of the children (and) that respondents' failure to plan for the future of the children had to be excused by their poverty. It is the opinion of this court that, absent evidence that a parent is receiving an inadequate amount of public assistance, the fact that a parent is receiving public assistance does not automatically excuse that parent from substantially planning for the future of a child. There was no proof in the present case that respondents were receiving inadequate public assistance."

(e) In Matter of Wayne T. D., 70 A.D.2d 617, 416 N.Y.S.2d 318 (2d Dept. 1977), the court held:

"Being a recipient of public assistance, the natural mother was presumably unable to support herself and a fortiori her first child as well....Since the natural mother could not support either herself or her first child, was on public assistance, and was actively caring for her newborn second infant during the last one and a half years of the period under review, it is obvious that she could not formulate any feasible and realistic plan for the future of her first child without substantial aid and assistance from the concerned local agencies. On the present record, it does not appear that more than minimal aid was forthcoming (citation omitted). Similarly, the record reveals she was financially unable to maintain substantial contact with her first child."

(f) In Matter of Raymond "M," 81 Misc.2d 79, 364 N.Y.S.2d 321 (Fam. Ct. St. Lawrence Co. 1975), the court said:

"(T)his young woman and her husband have no present plans whatsoever to take this child back into thair care. Their resources have by and large been spent maintaining their nomadic life style without any thought of making realistic plans for the return of the child."

f. The agency must make diligent efforts to encourage and strengthen the parental relationship. SSL §384-b(7)(a)

(1) "Diligent efforts" are defined by statute to mean "reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between the parent and child, (SSL §384-b(7)(f)), including but not limited to:

(a) consultation and cooperation with the parent in developing a plan for appropriate services to the child and his family;

(b) making suitable arrangements for the parents to visit the child;

(c) provision of services and other assistance to the parents so that problems which prevent the discharge of the child from care may be resolved or ameliorated;

(d) informing the parents at appropriate intervals of the child's progress, development and health. SSL §§384-b(7)(f)(1),(2),(3),(4)

(2) What constitutes "diligent efforts" will depend upon the particular facts and circumstances of individual cases. The courts will weigh the efforts extended in a particular case with the facts of that case to determine whether the efforts were "diligent."

(3) In Matter of Raymond "M," 81 Misc.2d 70, 364 N.Y.S.2d 321 (Fam. Ct. St. Lawrence Co. 1975), the court indicated the direction and emphasis of the agency's efforts and also noted these may change with the responses of the parents. The court noted:

"The diligent efforts requirement imposed by the statute must be gauged on a case by case basis. Efforts at rehabilitation should be designed to remedy the particular deficiencies in parental capabilities which are found to exist in any given case. Efforts should be carried out according to a plan for achieving realistic short-term and long-term goals. Diagnostic workups of the adults and the child should be obtained when necessary to aid in the development of the plan. Planning for the return of the child should begin when the child is placed in foster care. Therefore, of necessity, the planning should involve both the foster parents and the natural parent as well as the child if of sufficient age. Their combined input in and acceptance of the plan is essential to its success.

Any plan will undoubtedly require modification and updating from time to time as goals are achieved or not attained, or as circumstances change.....It may be proper in a given case for the agency to shift responsibility for achievement of planned goals to the natural parent with little or no outside help or interference from the agency caseworker....However, in other cases, consideragle encouragement and supportive assistance from the caseworker and other service agencies using appropriate caseworker techniques may be required to encourage and strengthen the parental relationship."

Note: SSL §409-e(3) provides that "the plan shall be reviewed and revised, in consultation with the child's parent or guardian, where appropriate, at least within the first ninety days following its preparation and at least every six months thereafter. Such revisions shall indicate the types, dates and sources of services that have actually been provided and an

evaluation of the efficacy of such services, and any necessary or desirable revisions in goals or planned services." Children placed under FCA Articles VII or X are not included under this section.

(4) In the Matter of Anita "PP," 65 A.D.2d 18, 410 N.Y.S.2d 916 (3rd Dept. 1978), held that the agency "is required to mold its efforts in the context of or in recognition of a parent's individual situation. The agency and the parent 'cannot be viewed as equals in the planning process (citations omitted)' and '(a)gency efforts correlative to their superiority are obligatory (citation omitted).'" At the fact-finding hearing testimony revealed that the father, an immigrant, was abandoned by his wife, and, unable to care for his children, placed them in foster care with DSS. The agency did not make diligent efforts when it made no realistic suggestions to the father but offered superficial advice which was unresponsive to the father's particular problems and needs. The agency refused to accomodate the father in his requests for visiting. In view of the father's current ability to care for the children and the difficulty in placing these children elsewhere, the children should be returned to their father. The court noted:

"At the fact-finding hearing the testimony revealed that the Agency was fully aware of appellant's difficulties which prevented the return of his children: heavy financial burdens; irregular and lengthy working hours; and absence at home of proper care for the children while he worked....The Agency's neglect in fulfilling its express statury duty cannot be excused or justified because it would have been difficult or burdensome for the Agency to undertake such efforts due to the parent's predicaments. Additionally 'the statute should be construed in favor of the (appellant) because of the human relationship (citation omitted).' Finally, we have pointed out that the statute is 'extremely harsh and seems contrary to human instincts and should only be implemented under the most stringent circumstances (citation omitted).' ...Thus, as far as the record discloses, the Agency made no concrete proposals in fulfillment

of its statutory duty of 'developing a plan for appropriate services to the child and his family (citation omitted)' and never truly assisted appellant in an affirmative fashion."

(5) In Matter of "Male" Chaing, N.Y.L.J. June 30, 1977, p. 13, col. 2, the court dismissed the petition for termination of parental rights because of the agency's insensitivity to the parent's predicament, and a failure to utilize "effective and appropriate casework." The court said:

"(It)...is mainly one of failure on the part of the social work staff at the agency to comprehend and empathize with this woman's problems. The young and inexperienced Caucasian social workers apparently had no frame of reference within which to understand this highly educated and sensitive Chinese woman attempting to adjust to an alien world....In July, 1973, Miss Lavery the social worker assigned to this case determined that Mrs. Chaing could care for the boy and he was returned home. Miss Lavery arranged for a part-time nursery school and testified that the two other Chaing children were now teen-agers and could help care for the boy. The social worker was apparently not aware that after several separations, Mr. Chaing permanently left the home shortly before Chung was returned home....and the full burden of his care and the household duties fell on Mrs. Chaing....The social worker seemed to be unaware of most of these problems and most of her contacts with this frightened Chinese woman, who had problems with English, was on the telephone....(T)he agency determined that the mother would never be able to care for the child. They never worked with Mrs. Chaing in an effort to stabilize her life....Instead, the agency decided to resist visitation efforts of the natural parents, and set on a course of freeing Chung for adoption. The (agency) has been amazingly obtuse in (its) relationship with this family."

(6) In Matter of Joyce Ann R., 82 Misc.2d 730, 371 N.Y.S.2d 607, reversed, 52 A.D.2d 892 (2nd Dept. 1976), the court noted that an ultimatum from the agency, no matter how reasonable, does not, ipso facto, constitute diligent efforts.

(7) In Matter of Joyce A.R., 52 A.D.2d 882, 383 N.Y.S.2d 58 (2d Dept. 1976), the court noted that the agency made special arrangements for parental visiting, and, by the respondent's own admission, made concrete suggestions for support, so as to permit discharge of the child to its natural parent. The court indicated that the agency met its burden of proof in all respect.

See also Matter of Roxann Joyce M., 75 A.D.2d 872, 428 N.Y.S.2d 264 (2d Dept. 1980).

(8) Re to "make suitable arrangements for the parent to visit the child," see Matter of Antonio G., 64 A.D.2d 983, 408 N.Y.S.2d 818 (2d Dept. 1978); Matter of Myra Jones, 59 Misc.2d 69, 297 N.Y.S.2d 675 (Fam. Ct. N.Y.Co. 1969); Matter of Orzo, supra; Matter of Jean Yvette E., 59 A.D.2d 907, 399 N.Y.S.2d 249 (2d Dept. 1977); Matter of Irene O., 38 N.Y.2d 776, 381 N.Y.S.2d 865 (1975), reversing 47 A.D.2d 829, 366 N.Y.S.2d 25 (1st Dept. 1975).

(9) In Matter of Kimberly "I," 72 A.D.2d 831, 421 N.Y.S.2d 649 (3rd Dept. 1979), the court said:

"(We) note that appellant has taken these steps to establish a suitable home for Kimberly with little help from the agency despite its statutory duty to make 'diligent efforts to encourage and strengthen the parental relationship (citation omitted).' The agency's caseworkers held few meetings with appellant relative to her planning for Kimberly's future and gave her little

affirmative aid other than generally to advise her that she must have a suitable living arrangement and be able to properly care for the child. That being so, the agency obviously failed to make the mandated 'diligent efforts.'"

(10) In Matter of Antonio G., N.Y.L.J., March 9, 1977, affirmed 64 A.D.2d 983, 408 N.Y.S.2d 818 (2d Dept. 1978), the court held that the agency had failed to prove permanent neglect. In the case, the agency refused to discharge the children until the mother obtained a larger apartment for herself and the children. The mother was unable to secure this apartment, since the Department of Social Services would not increase her rent budget until she actually had custody of her children. The trial court noted:

"That this is a typical 'Catch-22' situation with which economically impoverished natural parents are confronted. They cannot get their children back until they get a larger apartment, and the welfare department will not allow them to get a larger apartment until they get their children back."

(11) In Matter of Sydney, 84 Misc.2d 932, 377 N.Y.S.2d 908 (Fam. Ct. Queens Co. 1975), an authorized agency initiated a proceeding against the biological mother of an illegitimate child for an order permanently terminating parental custody. The court dismissed the petition, stating:

"We choose rather rely for our decision here on the parallel (and to us shocking) failure of the Agency throughout the test period to efficiently explore the maternal grandmother as a known resource; or to make any overtures to the natural mother even though they knew at the outset of that period

1. the basic nature and limitations of the mother;
2. that she was experiencing an emotional sense of rejection and pessimism due to the repeated 'teasing' by the foster mother in the presence of the child;
3. that respondent had cooperated in the past;
4. that respondent constantly verbalized her desire for her child.

(12) In Matter of Derek Denlow, 87 Misc.2d 410, 384 N.Y.S.2d 621 (Fam. Ct. Kings Co. 1976), the child was removed from his mother's home during the mother's temporary absence, under the emergency removal powers of the Commissioner of Social Services. The child was two years old when placed.

The agency suspended home visits because the child claimed the visits made him unhappy, and scheduled no further visits, leaving it to the mother to visit her child when she wanted to. Many of her subsequent requests were denied for different reasons: vacations, illness, interrerence with schooling, etc., The court said:

"The instant case like all others of its kind is a hardship case with strong emotional appeal....The case would probably never have surfaced...if it were not for the §392 review of his status mandated by law. The agency then proposed that the child be freed for adoption as soon as it received permission to bring the proper proceeding. This has all the appearance of a convenient afterthought in anticipation of the §392 hearing. The situation never changed and was always the same...Nevertheless, the court may not abdicate its obligation to follow the law in favor of social planning.

When drained of emotion, the case at bar has little to recommend it in terms of legal merit no matter how good the sociology....On the evidence it cannot be said that (the agency) extended itself by diligent efforts to promote the parent-child relationship....The fact is that (the agency) did not adequately respond to the needs of the situation. It failed to encourage the respondent to deal with the child'd problems in light of her home circumstances, and even discouraged contact as harmful interference with his progress in foster care."

(13) The statute requires the agency to continue its efforts for at least one year.

(a) See dissent in Matter of Female "B," 49 A.D.2d 615, 370 N.Y.S.2d 672 (2nd Dept. 1975).

(b) In Matter of Nicolle R.R., 51 A.D.2d 823, 379 N.Y.S.2d 204 (3d Dept. 1976), the mother alleged the failure of the agency to make "diligent efforts to strengthen and encourage the parental relationship." The record indicated that the mother left the child with the agency four months after the birth of the child. The court said:

"The mother has absented herself from the State of New York and taken up residence in Florida, Massachusetts and Colorado. She has also exhibited no interest in the child except at times when the extension of the child's placement or a possible finding of permanent neglect was under consideration. By such conduct (she) has effectively thwarted any possible effort the local agency could have made to encourage and strengthen that relationship."

(c) SSL §384-b(7)(e) provides that "evidence of diligent efforts by an agency to encourage and strengthen the parental relationship shall not be required when the parent has failed for a period of six months to keep the agency apprised of his or her location."

(14) See Matter of Anonymous, 48 A.D.2d 696, 368 N.Y.S.2d 372, (2d Dept. 1975), reversed on other grounds, 40 N.Y.2d 96, 386 N.Y.S.2d 59, (1976), where the court dismissed the petition (based on abandonment) because the "agency failed to make use of information in its files by which it easily could have ascertained (the mother's) whereabouts."

(15) In Matter of Ray A.M., 48 A.D.2d 161, 368 N.Y.S.2d 374 (2d Dept. 1974), affirmed 37 N.Y.2d 619, 376 N.Y.S.2d 431 (1975), the court said:

"Both the Bureau of Child Welfare and (the agency) attempted to maintain contacts with the mother, in an effort to encourage visitation and thereby strengthen the parental relationship. Their efforts to set up visits met with little success, largely due to the failure of the mother to keep in touch with the agency.... (T)he mother interspersed long periods of neglect with sudden, hysterical and raging demands for the return of her child....There is evidence that, on at least two occasions, before the first commitment of the child, and later when the child had been abducted by the mother, the mother physically abused the child. The mother has lived at an inordinate number of addresses, when known, and the 'home' conditions were filthy with frequently changing occupants, if not derelicts....
Only by sophistic analysis can it be argued that the child care agency failed in its duty to 'encourage and strengthen the parental relationship' between this unfortunate child and the troubled and trouble-making mother. The mother exhibited not isolated instances of parental incapacity but a pattern of intransigence, instability and abusive conduct toward the child which, perforce, must have practically limited the agency in its efforts, if the best interests of the child were to govern the actions of parties and agencies..."

(16) Efforts undertaken by the agency to encourage and strengthen the parental relationship with the conviction that such efforts will not succeed may nonetheless by legally sufficient. See, e.g., Matter of Sylvia Clear, 58 Misc.2d 699, 296 N.Y.S.2d 184 (Fam. Ct. N.Y.Co. 1969), reversed sub nom. Matter of Klug, 32 A.D.2d 915, 302 N.Y.S.2d 418 (1st Dept. 1969), rehearing 65 Misc.2d 323, 318 N.Y.S.2d 876 (Fam. Ct. N.Y. Co. 1970), where the trial court noted:

"But where the agency's primary and exclusive efforts are to encourage the child's attachment to the foster parents and hinder and discourage the natural parental relationship, then the petition for termination of parental rights will be dismissed."

In Matter of Leon R.R., 66 A.D.2d 118, 412 N.Y.S.2d 474 (3rd Dept. 1979), reversed 48 N.Y.2d 117, 421 N.Y.S.2d 863 (1979), the court noted:

"...not only did (the agency) fail to demonstrate the inadequacy of the (natural parents') future plans for the child, but the record conclusively demonstrates that it had so aligned itself against the natural parents as to render its efforts, if that is what they might be termed, to reintegrate (the child) into his natural family insufficient to satisfy its statutory burden....Rather than attempting to encourage the relationship between parent and child, the agency fueled foster parents' sincere, but misplaced, desire to adopt the child, even suggesting at one time that they file a permanent neglect petition with the department 'backing them.'...The actions of (the agency) in this case fell far short of its statutory mandate to exercise due diligence to foster the parent-child relationship."

(17) Diminishing efforts by the agency after one year:

(a) In Matter of Amos H.H., 59 A.D.2d 795, 398 N.Y.S.2d 771 (3rd Dept. 1977), the court said:

"The parents...contend that the agency failed to use diligent efforts to reunite the family. On the contrary careful examination of the record reveals substantial efforts by the agency encouraging the parental relationship. Although the agency's efforts decreased somewhat... the parents' attitude at that time, manifested by their missing appointments, infrequent contacts with two of the

children and little interrelationship with the third despite fairly regular visits, demonstrates the futility understandably perceived by the agency."

(b) In Matter of Karas, supra, the court said:

"It is claims that the efforts of petitioner to encourage and strengthen the parental relationship failed to constitute 'diligent efforts' as required by statute.... Here (the agency's social worker) made arrangements with respondent to visit the children that same month but she failed to appear. Similar arrangements were made the following month and again (the natural mother) did not keep the appointment. The social worker...encouraged her to visit the children and make some plans for their return· he also offered to bring the children to his office for visits. His entreaties were unsuccessful....Although the social worker stopped visiting the (natural mother)... the efforts to reestablish a parental relationship were of adequate duration and the chance that continued efforts would be productive, in view of (the natural mother's) almost total unresponsiveness, was minimal."

(c) In Matter of Terry D., 53 A.D.2d 957, 385 N.Y.S.2d 844 (3rd Dept. 1976), the court stated:

"Over a period of approximately four years (the children)...have been in two foster homes, the second custodial arrangement being since December 12, 1975. During this period the Department of Social Services made numerous efforts to encourage visitation between mother and children, and while appellant did visit her children sporadically, she conducted herself between visits in a manner which suggested to the Department of Social Services that the moral and temporal interest of the children would be endangered

if custody of the children were returned to her. Appellant used narcotics and on one occasion voluntarily entered a drug rehabilitation center for treatment, only to leave after two months...She openly lived with a man while the children were in her temporary custody, and, on another occasion, when the children were about to be returned to her for a second time, she was involved in a bizarre sexual crime... On another occasion appellant was incarcerated in Scranton, Pennsylvania for reasons not explained in the record. Such conduct does not support appellant's contention of serious 'planning' or a capacity to plan for the future of children. We, therefore, find, that where, as here, an authorized child-caring agency made diligent efforts to encourage and strengthen the parental relationship over a period of almost four years and, failing in that effort, concluded that continued efforts to do so would be injurious to the best interests of the children, the agency is relieved of its statutory duty to continue such efforts and may initiate a proceeding to terminate custody."

(d) In Matter of Shantal M.K., 68 A.D.2d 482, 417 N.Y.S.2d 696 (1st Dept. 1979), the court stated:

"From December of 1970 to February of 1975, the agency had diligenty sought to encourage and foster the parental relationship. The agency caseworkers made countless visits during that time frame to counsel and assist the mother. The caseworkers referred the mother for psychiatric testing but the tests did not reveal any mental illnesses. The agency also provided the mother with a homemaker from March of 1973, to February of 1975. The agency's decision in February of 1975 to discourage further

visitation in the best interests of (the child) was only made after a significant expenditure of time and money on its part to foster the parental relationship."

(e) In Matter of Myra Jones, 59 Misc.2d 69, 297 N.Y.S.2d 675 (Fam. Ct. N.Y. Co. 1969), the natural mother alleged that during the fourth of her child's placement, the agency failed to make diligent efforts to encourage the parental relationship. The agency stopped its efforts one month before it instituted proceedings to terminate parental rights. The court stated:

"However, the agency's record...makes it crystal clear that the agency...wholeheartedly attempted for at least three years to help effectuate a plan for (the natural mother) to establish a home for (the child)....The agency workers supported these successive plans over these three years, repeatedly seeking out (the mother) to discuss them, encouraging her to secure work and work-training, exploring care for (the child)...and contacting her public assistance worker on her behalf....(T)he agency also made efforts to strengthen the parental relationship byinitiating and facilitating respondent's visits with her. During the first two years of placement these visits which (the mother) undertook only sporadically, were in the main conducted at places she elected. During the third year, the agency attempted to alleviate the disturbing effect on (the child) of this visiting pattern by restricting visits to the agency grounds, though at all times encouraging (the mother's) contact with her. While (the mother) accepted this arrangement only one out of the three times it was offered, indicating

displeasure with it on the other two occasions, the agency's limitation on the locus of visits does not establish a failure in its efforts to strengthen the parental relationship. It would be faithless to its duties as an authorized... agency if in these efforts it ignored the child's welfare; and the permanent neglect statute cannot be construed to envisage such an abandonment of its proper concerns."

(f) In Matter of Barbara P., 71 Misc.2d 965, 337 N.Y.S.2d 203 (Fam. Ct. N.Y. Co. 1972), the agency stopped further efforts to encourage the parental relationship more than twelve months prior to instituting a proceeding to terminate parental rights. The court in this case said:

"(T)he evidence establishes by more than a fair preponderance of the evidence that the petitioner exerted diligent and continuing efforts to encourage and strengthen the parental relationship from 1965 when they received (the child) in care until February, 1970 when they for the first time refused further visits with the parents. The record establishes that within two months after (the child's) birth...the mother secured public assistance and an apartment in which she lived with him for only one month. The mother then left him with an unrelated neighbor from whose home he was removed by the police to the New York Foundling Hospital. After care...(the child) was placed...in the foster home where he has continued to live for over seven years.

Attempts by the petitioner to contact the parents...were left unanswered....(M)ail addressed to the mother was returned marked 'Unclaimed.' .In the absence of any responses or initiation of contacts by either parent...the petitioner requested (DSS) for permission to plan for adoption on January 19, 1968. Nevertheless when the father

called the agency in February, 1968, and the worker learned that the parents had been in a drug program she tried to help the parents to get appropriate housing and public assistance. Despite failures to keep appointments following this call this worker (sic) did arrange to have the parents see (the child) on May 15, 1968....

Despite all past failures, the petitioner arrange for a family reunion for the parents with the three children on December 9, 1969, but the parents did not appear. One more such family reunion was planned for January 14, 1970 and this time the parents did appear.

...(T)he agency) came to the judgment in February, 1970 that to arrange for further visitation by the parents would not be in the best interest of the children. (One child) had spent at most three months of his life with his mother, and had been visited three times in over four and one-half years. (The two other children) had been in placement with the petitioner since June 14, 1968 and had been visited by the parents at only one family reunion... one year and eight months after placement with the petitioner....

The agency was certainly under no statutory duty to continue its efforts when it came to the conclusion that to do so would be injurious to the children....By promptly advising the father of the agency's decision to terminate visits and of his right to counsel so that the court could determine the issue of permanent neglect, the agency acted in forthright fashion and exercised its responsibility both to the children and to the parents."

(g) However, the agency need not exercise any efforts, diligent or otherwise, to encourage and strengthen the parental relationship when such efforts would be detrimental to the best interests of the child. SSL §384-b(7)(a)

(i) See Matter of Sanjivini K., supra.

(ii) In Matter of Wood, 78 Misc.2d 344, 383 N.Y.S.2d 115 (Fam. Ct. St. Lawrence Co. 1974), the court said:

"(I)f a parent presents a history of child abuse or conduct injurious to the emotional well-being of the child, it may be said that efforts to encourage and strengthen the parental relationship would be 'detrimental to the moral and temporal welfare of the child.' The facts of this case do not go so far. Here the parental conduct toward the children is neglectful, not abusive. It is characterized by misfeasance, not malfeasance. However, there is no indication that the Legislature intended the 1971 amendment to be applicable only in cases of parental abuse or malfeasance.

In this case the respondent has failed to make any effort to maintain contact with her children; she has seen them at most no more than three times in three years; she has displayed exceedingly poor judgment in the selection of her second husband, a man with a long record of criminal violence; she has display a gross inability to manage her finances; she has been committed to jail a second time for issuing fraudulent checks; she has been diagnosed as having 'little ability to cope with everyday life.' Viewing the totality of these circumstances, the department was justified in concluding that an effort 'to encourage and strengthen the parental relationship' would at best only create an artificial appearance of family unity which would not endure the test of time. Furthermore, in the process of such an effort, the children would be the subject of an experiment to determine whether or not this woman

could function as an adequate mother. If the experiment failed, the children could suffer a crushing rejection. It would not appear...that children, who have been once before traumatized by parental neglect and rejection, should be made the subject of such an experiment....(E)fforts made to strengthen the parent-child relationship would be detrimental to the moral and temporal welfare of the children. The department was justified in concluding...that efforts to rehabilitate the children with the mother would be futile and would only lull both mother and children into a harmfully false belief that reconciliation would occur in the future."

(iii) In Matter of Raymond M., supra, the court rejected the agency's claim that since there was a growing attachment between the child and his foster parents, to encourage and strengthen the parental relationship would be detrimental to the child. The court said:

"Admittedly, this young woman...acted irresponsibly and was grossly uncooperative with the caseworkers.... However, the evidence indicates that too frequently caseworker contacts resulted in confrontation in which threat and coercion were used to obtain compliance with imposed standards, standards which were largely unrelated to the mother's lack of stability and her deficiencies in parental skills. The actions of the agency fall far short of the statutory standard of diligent efforts required by the facts of this case....

(T)he agency urges that the record justifies a finding that diligent efforts should be excused for the reason that such efforts would be 'detrimental to the moral and temporal welfare of the child.' However, the evidence...does not support the

same conclusion. The mother, although from a deprived background, will undoubtedly mature and might well have benefitted substantially from appropriately planned casework services. Indeed, she has followed the caseworker's recommendation by maintaining contact with her child. Although she has failed to stabilize her life, it must be remembered that she is still only 19, and, if given sufficient help, may in time become a responsible mother and adult....

(T)he sole fact of a psychological attachment to a foster parent cannot control the determination of whether or not further efforts to encourage and strengthen the parental relationship would be 'detrimental to the moral and temporal welfare of the child.'"

(iv) In Matter of Andress, 93 Misc.2d 399, 402 N.Y.S.2d 743 (Fam. Ct. St. Lawrence Co. 1978), affirmed sub nom. Matter of Donna Dorene G., 70 A.D.2d 188, 420 N.Y.S.2d 576 (3rd Dept. 1979), reversed, 52 N.Y.2d 890 (1981) the court dismissed the petition noting the dissenting opinion of the Appellate Division:

"[T]he Social Services Law appears to excuse diligent efforts when they would be detrimental to the best interests of the child, a long separation does not serve as an excuse for diligent efforts where the agency has caused the separation to be lengthy rather than temporary; that the Family Court's initial finding of neglect in 1974 was in relationship to an infant then only a few months of age and that no effort has ever been made to assist this infant and its natural parent in reuniting themselves in a family unit, and that the contention that a meaningful relationship had been established between the child

and the foster parents is no basis for finding compliance with the statute."

(h) The petitioner will try to show that the parent or custodian failed for more than one year after the child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with the child. FCA §615(1)(d); SSL §384-b(7)(a)

(i) There is no specific requirement in the statutes that "contact with" be solely through physical meetings with the children, although they are strongly recommended and are an integral part of a parent-child relationship. What is clearly intended is that the parent demonstrate a real continuous concern and involvement with the child and not sporadic interest characterized by intermittent periods of indifference. See Matter of Ray A.M., 48 A.D.2d 161, 368 N.Y.S.2d 374 (2d Dept. 1974), affirmed 37 N.Y.2d 619, 334 N.E.2d 135, 376 N.Y.S.2d 431 (1975); Matter of Irene O., 47 A.D.2d 829, 366 N.Y.S.2d 25 (1st Dept. 1975), reversed 38 N.Y.2d 776, 381 N.Y.S.2d 865 (1975).

(ii) There is both a quantative and a qualitative component to this requirement. In the Matter of Klug, supra. In a concurring opinion, Justice Telzer noted:

"'Substantially' means more than occasional visits, a birthday card or a doll at Christmas. 'Contact' must

be interpreted to mean a meaningful contact where a parent has exercised her parental obligation and has provided love, affection and guidance."

(iii) In Matter of Barbara P., 71 Misc.2d 965, 337 N.Y.S.2d 203 (Fam. Ct. N.Y. Co. 1972), the court noted:

"The occasional and sporadic request to visit with no follow-through, followed by repeated absences of long duration, do not fulfill even minimal parental obligations and cannot be regarded as beneficial to the children."

(iv) In Matter of Tina XX, 73 A.D.2d 1013, 424 N.Y.S.2d 53 (3rd Dept. 1980), the court ruled that the parent, though in California, did maintain contact through numerous letters, telephone calls and cards and presents on special occasions, even though she did not visit the children for over one year prior to the commencement of the action.

(v) Except for physical or financial inability, excuses by a parent for failing to visit have generally been given little weight. See., e.g., Matter of Orlando F., supra (inconvenient distance); Matter of Denise Sydney, supra (teasing by foster mother); Matter of Shantal M. K., supra (involvement in a training program).

(vi) SSL §384-b(7)(b) provides that "a visit or communication by a parent with a child which is of such character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact."

In Matter of John S., supra, the court said:

"In any event, such visits as did take place between the parents and their children were at best superficial and devoid of any real emotional content, and were probably meaningless from the standpoint of the children who have come to view their real parents as strangers and their meeting with them as something to be endured."

See also Matter of Jose L.I., 46 N.Y.2d 1024, 416 N.Y.S.2d 537 (1979).

(i) The petitioner will try to show that the parent or custodian failed for more than one year after the child came into the care of an authorized agency substantially and continuously or repeatedly to plan for the future of the child. FCA §615(1)(d); SSL §384-b(7)(a)

(i) In Matter of Orlando F., supra, the court made it clear that the terminology "maintain contact with or plan for" may not be read in the conjunctive, but must be read in the disjunctive, and are thus separate requirements. The court then noted:

"The history of the statute (FCA §611) demonstrates that by amendment in 1973 the words 'and plan' were substituted by the words 'or plan,' thereby making it abundantly clear that separate requirements were intended (citation omitted). This distinction has been delineated and applied in other decisions (citations omitted), so that it has become recognized that a finding of failure to plan, in and of itself, suffices to support a determination of permanent neglect."

(ii) In Matter of Sydel D., 58 A.D.2d 810, 396 N.Y.S.2d 263 (2d Dept. 1977), the court said:

"...a finding of lack of continuous or repeated contact with a child over a period of more than one year following the date on which such child came into the care of an authorized agency, obviates the need for proving the lack of any plan by the mother for the future of such child."

(iii) In Matter of Myra Jones, 59 Misc.2d 69, 279 N.Y.S.2d 675 (Fam. Ct. N.Y.Co. 1969), the court defined the terms "substantially" and "plan":

"Construing the statutory phrase 'substantially...plan for the future of the child' in the light of the statutory purpose, the court holds that it requires the parent to plan constructively in a manner that he can and does attempt to implement. To 'plan,' according to Webster's Dictionary, means to 'project, program, schedule'; the connotation is activist. Since the statutory mandate is that the parent plan for the child's 'future,' it does not require the consummation of the parent's plan to care for the child within the year of planning. However, the 'substantiality' of the plan for the particular parent must be evidenced by his performing some act to advance its accomplishment. Unless 'substantially plan' is so interpreted, the provision that the parent must be 'physically and financially able' to plan (in order for his failure to do so to be significant), would be pointless, for physical or financial capability is irrelevant

to a phantasy plan."

It must be noted that this was one of the earliest cases which defined the "planning" requirement.

(iv) The Court of Appeals considered this duty to plan in In the Matter of Orlando F., supra, and defined it as follows:

"To 'substantially plan' means to formulate, and act to accomplish, a feasible and realistic plan."

The Court further commented on the "planning" concept:

"'Substantial planning' may appear in this discussion to demand a degree of self-awareness, insight and resolution that most people lack, especially perhaps the mother of a child in long-term foster care. Yet the statute was designed to measure the interests and capabilities of just such a person. Therefore, so that the planning requirement will not become simply a device to permit termination in nearly all cases where the other statutory conditions are met, the standards to evaluate the adequacy of the parent's plans should not be set unrealistically high. Courts will have to act with sensitivity and care in determining whether the parent's plans are sufficiently credible and sound to satisfy the statutory requirement....(E)ach factual pattern will undoubtedly reveal peculiarities of its own but the particular facts and totality of circumstances must be scrutinized..."

The purpose of the plan is to resolve the problems that brought the child into placement and to return the child to the care and custody of the parent. Implicit in this concept is that the parent make some degree of effort to accomplish this goal.

(v) In Matter of Seith "SS," 66 A.D.2d 914, 410 N.Y.S.2d 719 (3rd Dept. 1978), the court said:

"Following the release of (the) father from the Franklin County Jail in 1976, the (agency) scheduled four meetings with the (parents) for the purpose of planning for their children, and (the parents) missed three of the meetings and then moved to the Schenectady area where, according to a report from (the agency), they exhibited an unwillingness to change their life style in order to get their children back. These factors, together with the fact that (the parents) have divorced and not remarried also demonstrates (the parents') failure to plan for the future of their children."

(vi) In Matter of Denise Sydney, supra, the court said:

"The Agency presents us with allegations of failure to contact and failure to plan. We find that the cooperation of this respondent through the years (including the test period) in moving to more spacious quarters, in engaging in prolonged educational training programs, and in obtaining successively better paying jobs

constituted 'planning' by conduct. Neither articulation nor abstract reasoning are a sine qua non to compliance where purposeful acts are significantly present."

(vii) In Matter of Female "B," 49 A.D.2d 615, 370 N.Y.S.2d 672 (2d Dept. 1975), the court took into consideration the parent's psychological problem and noted:

"The regularity of contact...is unquestioned. Twice a month this ...mother traveled from Manhattan to Wading River...to visit her... daughter. This conduct goes counter to any intent on her part to abandon the child.

True...(the mother) has failed to make sufficient plans for the return of her child. The record, however, indicates that this is because of a generally inadequate and defeatist attitude towards life itself, which makes it difficult for her to plan for anything. ...It may be that her generalized lassitude is so ingrained that she cannot make the minimum plans necessary for return of her child, i.e., to move, to arrange for day care of the child...or to care for the child herself....The record, however, does not conclusively so indicate. She should not be punished in so devastating a fashion until we are certain that, even with the aid of proper counseling, there is no hope for a reconstitution of the family unit....

I interpret the statutes to mean that failure to plan for the future of the child may be utilized as the sole basis for a finding of permanent neglect only where such failure (a) is clearly indicative

of an intention to abandon the child or (b) is based on emotional, psychological or mental inadequacy and the failure continues notwithstanding the studied assistance of available agencies."

The court reversed and remitted the case to family court for a hearing to determine if the mother was unable or unwilling to plan for the future of the child, or otherwise done so; and continued custody and visitation.

(viii) In Matter of Barbara P., supra, the court rejected the argument that a lowering of planning standards should be made to take into account a different socio-economic class. The court stated:

"...(T)he parents urge that the court take into consideration that their failure to maintain contact with their children must be weighed in the light of the 'class mores of poor, black, and unschooled persons,' and the 'impossible barriers' created by requirements that they comply 'with the customs of bourgeois urban existence.' Counsel for (the parents) states that (the parents) concede with hindsight that they 'should have acted the way our society demands all its members act, with civility, urbanity and deference.' No such demands were made by the (agency) in this case, and (the parents') rationalizations seem rather to be a belated attempt to justify their continuous failure to function as parents throughout the lives of their children. The plea of counsel seems to urge that to

unddfstand all concerning the problems of the parents must result in excusing all that parents do to or fail to do for their children.

This plea must be rejected. To accept is would constitute regression to the period when the rights of parents were treated as absolute, and would negate the rights of children as developed by the Legislature and courts of the State of New York. It would require courts to sanction less protection for the children of poor, black and uneducated parents than for children of more privileged parents, thus violating their constitutional right to equal protection under the law."

(ix) In Matter of Orlando F., supra, the court held:

"...(T)he mother has evinced a 'burning desire' to regain custody of the child, but it is undisputed that in the three years preceding this litigation she failed to take the affirmative steps necessary to insure that (the child) would be the rightful beneficiary of an adequate home life if returned to her. Missed appointments, promisses to secure her own apartment--which never reached fruition, living with various persons and an inability to be placed in a job as a result of nonattendance at the rehabilitation center compels this conclusion....

The child has remained with the foster parents virtually since birth and they have expressed a desire to adopt. When the natural parent fails to accept the parental role, even though the result of

shortcomings for which he or she may not be fully responsible, the 'best interests' of the child, the pivotal consideration underlying all of these proceedings, dictates that the right to custody be terminated."

In fact the court noted that the parent failed "to exert even a minimal attempt to develop a plan for her child's future."

(x) This failure to plan at a minimal level is seen in the following cases:

In Re Anthony L. "CC," 48 A.D.2d 415, 370 N.Y.S.2d 219 (3rd Dept. 1975), where the court stated, "The mother has had various periods of time...when she was either on furlough, parole or not yet convicted; however, these were not lengthy. Nevertheless...she has only had face to face visitations with her son on three occasions and her free periods would have permitted far more contacts. The record establishes that she has not kept regular contact with her child or the Agency. ...(T)he record establishes that she never actually formulated or seriously contemplated any plans for the future of her infant although the Agency, whenever it was able to locate her, made diligent efforts to encourage and strengthen the parental relationship. The record is convincing that the mother was more interested in her selfish desires than in the infant and that the Agency gave her as much encouragement to enter into a continuing parental relationship as her way of life permitted."

In the Matter of Terry D., supra, where the court said:

"(W)hile the appellant might love her children, her expressions and demonstrations of that feeling were episodic and not in any way interrelated so as to show a 'plan' for the return of her children. The proof clearly evinced an inability on the part of appellant to stabilize her life so as to plan the care which her children require and need."

Matter of Mamie A., 71 A.D.2d 887, 419 N.Y.S.2d 641 (2d Dept. 1979), where the court noted:

"The evidence adduced at the fact-finding hearing demonstrated that the parents are incapable of making substantial plans for the children's future. The father was urged by the (agency's) caseworker to attend alcoholic counsel programs but his attendance at those programs was, at best, sporadic. The mother has suffered from mental illness and has been hospitalized in the past. The parents' monthly visits with their children were brief, and although they were allowed to visit all day once a week, they never visited more than once a month for 15 to 30 minutes. Not only were they sometimes intoxicated on these occasions, but the only overnight visit which the children made to them, one of the children received a severe unexplained burn for which the parents did not seek medical attention....

Although the parents have made the mentioned efforts to keep in contact with their children, the totality of the evidence indicates that they are incapable of making substantial plans for the future of the children...."

(j) See also Matter of William Michael A., 70 A.D.2d 1007, 418 N.Y.S.2d 195 (3rd Dept. 1979); Matter of Dana J., supra.

(k) Planning means to accomplish a feasible and realistic plan. Matter of Donna Dorene G., supra.

(i) See also Matter of Barbara P., supra, where the court stated:

"(T)he record negates (the parents') conclusion that thair search for a drug rehabilitation program suited to their needs constitutes planning for the future of their children. Serious and continuing drug involvement with intermittent efforts toward freeing themselves of their habits in a succession of detoxification and treatment programs followed by return to the use of heroin cannot be viewed as supporting the contention of serious planning or the ability to plan for the future of the children. Planning by a parent for the future has been interpreted to mean to formulate and to act to accomplish a feasible and realistic plan for a child."

(ii) In Matter of Kimberly I., supra, the court found the parent had made adequate plans:

"(W)e find that (the mother) has taken substantial strides to provide adequate shelter and a stable home for (the child). She has married and moved to Pennsylvania where the couple resides in a home which is equipped with running water and toilet facilities and which the couple is in the process of 'fixing up.' Moreover, evidence in the record indicates that (the mother)

has a new baby for whom she provides satisfactory care and that her husband has the desire for and reasonable prospects for employment and should be able to find work once his temporary health problems are rectified. Under these circumstances, we conclude that (the mother) has demonstrated by her conduct and actions that she has planned for the future of (the child) to the extent of her limited capabilities."

(iii) See also Matter of Santosky, supra.

(1) The parent's failure to plan is not confined to a one year period immediately preceding the filing of the petition, but may be any one year period prior to the filing of the petition. See Matter of Joyce Ann R., supra; Matter of B., supra; Matter of Jones, 59 Misc.2d 69, 297 N.Y.S.2d 675 (Fam Ct. N.Y. Co. 1969).

4. The parents' case

a. Counsel should attempt (both in cross-examination of the petitioner's witnesses, or in direct examination of his own witnesses) to prove that the agency did not make diligent efforts to encourage and strengthen the parental relationship, or tried to discourage the parent's efforts at reconciliation, or favored the foster parent(s) over the natural parent(s).

b. Counsel should attempt to prove that the client was physically or financially unable to maintain contact.

5. Other evidence

a. The court may take judicial notice of its own records. In re Denlow, supra.

b. Where the child is over fourteen years of age, the court may in its discretion consider the wishes of the child in determining whether the best interests of the child would be promoted by the commitment of guardianship and custody of the child. SSL §384-b (3)(k).

The court, in In re Denlow, supra, gave some credence to the wishes of a child fourteen years of age or younger.

c. The agency need not furnish proof of the likelihood that the child will be placed for adoption. SSL §384(b)(3)(i)

6. Burden of proof

a. The burden of proof is on the petitioner.

b. Proof adduced at the fact-finding hearing should carefully adhere to statutory requirements. See Matter of Thomas TT, 67 A.D.2d 788, 412 N.Y.S.2d 482 (3rd Dept. 1979); Matter of Anita PP., supra; Matter of Florence X, 75 A.D.2d 942, 428 N.Y.S.2d 80 (3rd Dept. 1980).

7. The dispositional hearing

a. Upon the completion of the fact-finding hearing, the court must hold a dispositional hearing to determine what order of disposition should be made in accordance with the best interests of the child. FCA §§623, 625(a); Matter of Lewis, 41 A.D.2d 619, 340 N.Y S.2d 841 (1st Dept. 1973).

b. If all parties consent, the court may, upon the motion of any party or upon its own motion, dispense with the dispositional hearing and make an order of disposition on the basis of competent evidence admitted at the fact-finding hearing. FCA §625(a)

c. Without such consent, a failure to hold a dispositional hearing is reversible error. Matter of Roy Anthony A., 90 Misc.2d 35, 393 N.Y.S.2d 515 (Fam. Ct. N.Y. Co. 1977), reversed 59 A.D.2d 662, 398 N.Y.S.2d 277 (1st Dept. 1977).

d. A hearing where all the parties are given an opportunity to present evidence as to a disposition and after submitting evidence have nothing further to submit--such hearing qualifies as a dispositional hearing. Matter of Benya, 54 A.D.2d 879, 384 N.Y.S.2d 1 (1st Dept. 1976).

e. The court may adjourn a dispositional hearing for good cause shown on its own motion or on the motion on behalf of the child, or on motion of the parent or other person responsible for the care of the child. FCA §626(a)

f. Before a dispositional hearing may commence, the court may adjourn the proceedings to enable it to make inquiry into the surroundings, conditions and capacities of the persons involved in the proceedings. FCA §626(b)

g. It is within the discretion of the family court to permit temporary visitation, under the supervision of the Bureau of Child Welfare, during the interval between fact-finding and disposition. Matter of Ernestina H., 55 A.D.2d 647, 390 N.Y.S.2d 148 (2d Dept. 1976).

h. A foster parent having had continuous care of a child for more than 18 months through an authorized agency, shall be permitted as a matter of right as an interested party, to intervene in any proceeding involving the custody of the child. SSL §383(3); see Matter of Jacqueline J., 74 Misc.2d 254, 343 N.Y.S.2d 679 (Fam. Ct. Queens Co. 1973).

i. Such intervention in (h), supra, may be made anonymously or in the true name of such foster parents. SSL §383(3); see Matter of Laura Ann, 82 Misc.2d 776, 371 N.Y.S.2d 591, (Fam. Ct. Rockland Co. 1975); Matter of Lisa M., 87 Misc.2d 826, 381 N.Y.S.2d 46 (Fam. Ct. Kings Co. 1976), re intervention of foster parents at a fact-finding hearing.

j. Only material and relevant evidence may be admitted in a dispositional hearing; it need not be competent. FCA §624

k. Reports prepared by the probation service or a duly authorized agency for use by the court prior to the making of an order of disposition shall be deemed confidential information furnished to the court which the court in a proper case may, in its discretion, withhold from or disclose in whole or in part to the law guardian, counsel, party in interest, or other appropriate person. Such reports may not be furnished to the court prior to the completion of a fact-finding hearing, but may be used in a dispositional hearing. FCA §625(b)

(1) Such evidence may relate to parental control or of failure to maintain contact with a child following the date of the filing of the petition (FCA §624); parents' "past history" (Matter of Seith "SS," supra); professional testimony of the child's interests and needs (Matter of Thomas "TT," supra).

(2) See also Matter of Female "M," 70 A.D.2d 812, 417 N.Y.S.2d 482 (1st Dept. 1979).

l. The dispositional order is made solely in accordance with the best interests of the child. FCA §§623, 631

(1) There shall be no presumption that such interests will be promoted by any particular disposition. FCA §631

(2) It is the child's interests at the time of the hearing that controls. Matter of Myra Jones, supra.

(3) There is no statutory definition of "best interests of the child." But see generally Matter of Raymond M., supra; Bennett v. Jeffreys, supra.

m. At the conclusion of the dispositional hearing, the court may enter one of the following dispositions:

(1) dismiss the petition. FCA §632

(2) suspend judgment but not for longer than one year. FCA §633

(3) permanently terminate custody of the parent and award custody to the petitioner. FCA §634; see Matter of Sylvia Clear, supra; Matter of Myra Jones, supra; Matter of Tyease "J," 83 Misc.2d 1044, 373 N.Y.S.2d 447 (Sur. Ct. N.Y. Co. 1975).

n. It has been held by courts that it is beneficial for siblings to be raised together, and the courts are thus reluctant to separate them unless there is a need to do so. Matter of Malik M., 40 N.Y.2d 840,

387 N.Y.S.2d 835 (1976); Matter of Sylvia Clear, supra; Matter of Patricia Ann W., 89 Misc.2d 368, 392 N.Y.S.2d 180 (Fam. Ct. Kings Co. 1977).

o. In evaluating the "best interests" of the child, the court may take into consideration the child's ties to grandparents or other blood relatives. But see Matter of Angie and Michell B., N.Y.L.J. January 17, 1978, p. 7, col. 3, in which the court said:

"Having established that the law gives primacy to a fit parent in a custody dispute, this court finds that it is not bound by the rule in the case at bar. This case makes it abundantly clear that the rule applies only to parents and not other blood relatives. Non-parent relatives stand in the same position as any other contestant for the child's custody and the sole criterion for determination is the best interests of the child. No real relationship ever developed between the children and the grandfather....Transfer of these school-aged children to a complete stranger would be a fearsome and traumatic experience (and) would not be in (their) best interests."

p. The maximum duration of a suspended judgment is for one year (FCA §633), unless at the conclusion of that period "exceptional circumstances" require an extension for an additional year.

q. An order suspending judgment must contain at least one of the terms and conditions enumerated in 22 NYCRR §2506.1, requiring the parent to:

(1) sustain communications of a substantial nature with the child by letter or telephone at stated intervals;

(2) maintain consistent contact with the child, including visits or outings, at stated invervals;

(3) participate with the agency in developing and effectuating a plan for the future of the child;

(4) cooperate with the agency's court approved plan for encouraging and strengthening the parental relationship;

(5) contribute toward the cost of maintenance of the child if possessed of sufficient means or able to earn such means;

(6) seek to obtain and provide proper housing for the child;

(7) cooperate in seeking to obtain and in accepting medical or psychiatric diagnosis or treatment, alcoholism or drug treatment, employment or family counseling or child guidance, and permit information to be obtained by the court from any person or agency from whom the parent is receiving or was directed to receive such services;

(8) satisfy such other reasonable terms and conditions as the court shall determine to be necessary or appropriate to ameliorate the acts or omissions which gave rise to the filing of the petition.

(a) A copy of the order suspending judgment containing the condition(s) must be given to the parent.

(b) Accompanying this order there must be a written statement asvising the parent that a failure to obey the terms and conditions of the order may result in its revocation and therefore the court may issue an order of commitment of the child.

(c) The court may require the parent or agency to report to the court if the terms and conditions of the order are being complied with, and upon notice to the parties, the court may modify the terms and conditions of that order.

(d) If the parent does not comply with the order, the agency may file a petition to revoke

the order. The petition must allege the acts or omissions that constituted the non-compliance with the order. The court, after a hearing, may revoke the order and enter an order of commitment for the child. See Matter of Holly "E," 45 A.D.2d 893, 357 N.Y.S.2d 219 (3rd Dept. 1974); Matter of Brenda YY, 69 A.D.2d 966, 416 N.Y.S.2d 346 (3rd Dept. 1979).

r. In certain circumstances, if the court orders the discharge of the child to the mother, or other change of custody, the court must first hold a dispositional hearing to consider the "best interests" of the child. See Matter of Jonathan D., 62 A.D.2d 947, 403 N.Y.S.2d 750 (1st Dept. 1978). In this case the child had been in the custody of foster parents for six and one half years.
See also Matter of Jonathan D., (not the same case as that cited infra) 97 Misc.2d 858, 412 N.Y.S.2d 733 (Fam. Ct. N.Y. Co. 1979).

SELECTED BIBLIOGRAPHY

Adler, L., "Child Abuse Victims: Are They Also Victims of an Adversarial and Hierachial Court System?" 5 Pepperdine L. Rev. 717-39 (1978).

Areen, J., "Intervention Between Parent and Child: A Re-Appraisal of the State's Role in Child Neglect and Abuse Cases," 63 Georgetown L.J. 887-937 (March, 1975).

Basharov, Douglas J., "The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect," 23 Villanova L. Rev. 458-520 (1978).

Bross, D., "Legal Advocacy for the Maltreated Child," Trial, 28-32, 68, Vol. 14, No. 7 (July, 1978).

Bross, D., "Analysis of the Protected Status of Maltreated Children and Youth," (to be published) Journal of Social Issues (1979).

Bross, D.; Meredyth, A., "Neglect of the Unborn Child: An Analysis Based on Law in the United States," (to be published) Child Abuse and Neglect: The International Journal (1979).

Brown, R.H.; Fox, E.S.; Hubbard, E.L., "Medical and Legal Aspects of the Battered Child Syndrome," 49 Chicago-Kent L. Rev. 45-84 (1972).

Chase, Nuomi Felgelson, A Child Is Being Beaten, Holt,Reinhart and Winston: New York (1975).

Cozzola, Richard, "Annotated Bibliography of Legal Articles on Child Abuse," (an excellent 21 page annotated bibliography available for $4.00, plus $2.00 for shipping and handling) the National Committee for the Prevention of Child Abuse, Suite 510, 111 East Wacker Drive, Chicago, Ill. 60601.

Crouch, R.E., "Essay on the Critical and Judicial Reception of Beyond the Best Interests of the Child," 13 Family Law Quarterly 49-103 (1979).

Cruickshank, D., "Alternative to the Judicial Process: Court Avoidance in Child Abuse Cases," 12 Univ. of British Columbia L. Rev. 248-75 (1978).

D'Ambrosio, Richard, No Language But A Cry, Dell Publishing Company: New York (1970).

DeFrancis, Vincent and Carroll Lucht, "Child Abuse Legislation In The 1970's," American Humane Association, Children's Division: Denver, Colorado (revised ed. 1974).

DeMause, L., The History of Childhood, Harper & Row: New York (1974).

Dickins, Bernard M., "Legal Responses to Child Abuse," 12 Family Law Quarterly 1-36 (1978).

Flannery, Ellen J., "synopsis: Standards Relating to Abuse and Neglect," 57 Boston Univ. L. Rev. 663-68 (1977).

Fontana, Vincent, J., "The Maltreated Children of Our Times," (Preface to "Medical, Legislative, and Legal Aspects of Child Abuse and Neglect: A Symposium") 23 Villanova L. Rev. 445-57 (1978).

Fontana, Vincent J., "Child Abuse: Tomorrow's Problems Begin Today," 22 Catholic L. Rev. 297 (1976).

Fontana, Vincent J., "To Prevent Abuse of the Future," 10 Trial 14-18 (1974).

Fraser, B.G., "A Pragmatic Alternative to Current Legislative Approaches to Child Abuse," 12 Amer. Crim. L. Rev. 103-24 (1974).

Fraser, B.G., "Towards A More Practical Registry," 51 Denver L. J. 509-28 (1974).

Fraser, B., "A Pragmatic Approach to Child Abuse," 12 Amer. Crim. L. Rev. 103 (1974).

Fraser, B., "Legislative Status of Child Abuse Legislation," (in Kempe, C.H. and Helfer, R., "The Battered Child,") Univ. of Chicago Press: Chicago (2nd ed. 1974).

Fraser, B., "Child Abuse and Neglect: Alternatives for State Legislation," Report No. 44, Education Commission of the States (December, 1974).

Fraser, B., "Child Abuse," Compact Magazine, 8(2): 10 (March-April, 1974).

Fraser, B., "Pediatric Bill of Rights," 16 South Texas L. Rev. 245 (1975).

Fraser, B., "Child Abuse and the Schools," Illinois School Board Journal, 43(1): 31 (Jan-Feb,1975).

Fraser, B.and Besharov, D., "Child Abuse and Neglect, Model Legislation," Report No. 71, Education Commission of the States (Sept.,1975).

Fraser, B., "Child Abuse and the Child Protection Act," Dep't of HEW: Office of Child Development (1976).

Fraser, B., "The Child and the Parent: A Delicate Balance," (Chapter 18 in Helfer, R.E. and Kempe, C.H., "Child Abuse and Neglect: The Family and the Community) Ballinger Pub. Company: Cambridge, Mass. (1976).

Fraser, B., "Child Advocacy," (Chapter 13 in Martin, H., "The Abused Child: A Multidisciplinary Approach to Developmental Issues and Treatment) Ballinger Pub. Company: Cambridge, Mass. (1976).

Ganley, Paul M., "Battered Child: Logic in Search of Law," 8 San Diego L. Rev. 364-403 (1971).

Gelles, Richard D., "Child Abuse As Psychopathology: A Sociological Critique and Reformulation," American Journal of Ortnopsychiatry, 43(4): 611-621 (July, 1973).

Gil, David, Violence Against Children, Harv. Univ. Press: Cambridge, Mass. (1970).

Goldstein, J., "Medical Care for the Child At Risk: On State Supervision of Parental Authority," 86 Yale L.J. 645 (1977).

Goldstein, Joseph, Beyond the Best Interests of the Child, The Free Press: New York (1973).

Grumet, Barbara R., "Plaintive Plaintiffs: Victims of Battered Child Syndrome," 4 Family Law Quarterly 290-317 (1970).

Hays, Richard H.,"Child Abuse: An Overview," 8 Creighton L. Rev. 743-56 (1975).

Helfer, Ray, "The Diagnostic and Treatment Programs for Child Abuse and Neglect," Publication No. OHD 75-69, Department of Health, Education and Welfare, U.S. Government Printing Office: Washington, D.C. (1975).

Helfer, R. and Kempe, C.H. (eds.), The Battered Child, Chicago Press: Chicago (2nd ed. 1974).

Helfer, R. and Kempe, C.H. (eds.), Child Abuse and Neglect: The Family and the Community, Ballinger Pub. Company: Cambridge, Mass. (1976).

Helfer, R., "Making the Diagnosis of Child Abuse and Neglect," Pediatric Basics (Feb., 1974).

Hochhauser, L., "Child Abuse and the Law: A Mandate for Change," 18 Howard L.J. 200-19 (1973).

Institute for Judicial Administration, A.B.A. Juvenile Justice Standards Project, "Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children," tentative draft, Institute for Judicial Administration: New York (1976).

Kaizen, M.S., "Child Abuse" The Role of Adoption As A Preventative Measure," 10 John Marshall Journal of Practice and Procedure 546-66 (Spring, 1977).

Katz, Sanford N.; Ambrosino, Lillian; McGrath, Melba; and Sawitsky, Kitt, "Legal Research on Child Abuse and Neglect: Past and Future," 11 Family Law Quarterly 151-84 (1977).

Katz, S.N.; Schroeder, W.A.; Sidman, L.R., "Emancipating Our Children: Coming of Legal Age in America," 7 Family Law Quarterly 211-41 (Fall 1973).

Katz, S.N., When Parents Fail, Beacon Press: Boston (1971).

Kempe, C.H.; Silverman, F.: Steele, B.F.; Droegmueller, W., and Silver, H., "The Battered Child Syndrome," 181 Journal of American Medical Association 17-21 (July, 1962).

Kempe, C.H.,"Paediatric Implications of the Battered Baby Syndrome," Archives of Diseases of Childhood, 46: 245 (Feb., 1971).

Kempe, C.H., and Helfer, R. (eds.), Helping the Battered Child and His Family, J.B. Lippincott: Philadelphia (1972).

Kempe, C.H., "A Practical Approach to the Protection of the Abused," 51 Pediatrics 804 (April, 1973).

Kempe, C.H., "Approaches to Preventing Child Abuse: The Health Visitors Concept," Vol. 130, American Journal of Diseases of Children (Sept., 1976).

Kempe, R.S. and Kempe, C.H., Child Abuse, The Developing Child Series, Harv. Univ. Press: Cambridge, Mass. (1978).

Kerns, D.L., "Child Abuse and Neglect: The Physician's Role in Diagnosis and Reporting," (to be published) Connecticut Medicine (1979).

Levine, R.S., "Caveat Parens: A Demystification of the Child Protective System," 35 Univ. of Pittsburg L. Rev. 1-52 (Fall, 1973).

Lowry,M.R., "Judge v. Social Worker: Can Arbitrary Decision-Making Be Tempered by the Courts," 22 N.Y.U. L. Rev. 1033-50 (Nov., 1977).

McCathren, Randall R., "Accountability in the Child Protection System: A Defense of the Proposed Standards Relating to Abuse and Neglect," 57 Boston Univ. L. Rev. 707-31 (1977).

McClean, J.D., "The Battered Baby and the Limits of the Law," 5 Monash L. Rev. 1-15 (Dec., 1978).

McGrath, Melba, "Early Sorrow: Some Children of Our Times," 8 Family Law Quarterly 91-99 (1974).

McKenna, J.J., "A Case Study of Child Abuse: A Former Prosecutor's View," 12 Amer. Crim. L. Rev. 165-78 (Summer, 1974).

Martin, H.; Beezley, P., "Prevention and the Consequences of Child Abuse," Journal of Operational Psychiatry, Vol. 1(1): 68-77 (Fall-Winter, 1974).

Martin, H.; Beezley, P.; Conway, E.; Kempe, C.H., "The Development of Abused Children, Part I: A Review of the Literature; Physical, Neurologic and Intellectual Outcome, Part II, Advances in Pediatrics," 21: 25-73 (1974).

Martin, H.; Rodsheffer, M., "Effects of Parental Abuse," in H. Martin (ed.), The Abused Child: A Multidisciplinary Approach to Developmental Issues and Treatment, Ballinger Pub. Company:Cambridge, Mass. (1976).

Martin, H. and Rodsheffer, M., "Effects of Parental Abuse and Neglect on Children," Journal of Pediatric Psychology, Vol. I, No. 2, at 12-16 (Spring, 1976).

Martin, H., The Abused Child: A Multidisciplinary Approach to Developmental Issues and Treatment, Ballinger Pub. Company:Cambridge, Mass. (1977).

Maas, H. and Engler, R., Children in Need of Parents, Colum. Univ. Press: New York (1959).

Mondale, Walter F., "Introductory Comments: Child Abuse Symposium," 54 Chicago-Kent L. Rev. 635-39 (1978).

Pavenstadt, Eleanor, "An Intervention Program for Infants in High Risk Homes," American Journal of Public Health, Vol. 63 (May,1973).

Pearlman, Social Casework: A Problem-Solving Process at 184 (1959).

Pierron, G.J., "Child Abuse and Neglect: The Legal Challenge," 46 Journal Kan. Bar Assn. 167-81 (Fall, 1977).

Schmitt, B., "Child Abuse," in Kempe, C.H., et al. (eds.), Current Pediatric Diagnosis and Treatment, Lange Medical Pub. (2d ed. 1972).

Schmitt, B. and Kempe, C.H., "The Battered Child Syndrome," in Kelley, V.C. (ed.), Brennemann-Kelley Practice on Pediatrics, Harper & Row Publishers (2d ed. 1972).

Schmitt, B. and Kempe, C.H. (eds.), "Neglect and Abuse of Children," in Vaughan and McKay, R.S. (eds.), Nelson's Textbook on Pediatrics, W.B. Saunders Company: Philadelphia (10th ed. 1974).

Schmitt, B. and Kempe, C.H., "The Pediatrician's Role in Child Abuse and Neglect," Current Problems in Pediatrics monograph, Yearbook Medical Publishers: Chicago, Vol. 5, No. 5 (1975).

Schmitt, B. and Kempe, C.H., "Child Abuse," in The Encyclopedia Americana (1974).

Schmitt, B., "What Teachers Need to Know About Child Abuse and

Neglect," 52 Childhood Education 58-62 (Nov-Dec., 1975).

Steele, B., Anthony, E.; Benedek, T., "Parental Abuse of Infants and Small Children," Parenthood, Its Psychology and Psychopathology, Little Brown and Company: Boston (1970).

Steele, B., "Child Abuse: Its Impact on Society," 68 Ind. State Medical Association Journal 91-194 (1971).

Steele, B., "Distorted Patterns of Parenting and Their Origin," in The Battered Parent: Stresses of Contemporary Parenthood, Univ. of Oklahoma: Children's Medical Center (1973).

Steele, B., "Working With Abusive Parents," Dep't of Health, Education and Welfare Publication No. OHD 75-70, Government Printing Office: Washington, D.C. (1975).

Sussman, A., "Reporting Child Abuse: A Review of the Literature," 8 Family Law Quarterly 245-313 (Fall, 1974).

Raffalli, Henri C., "The Battered Child: An Overview of a Medical, Legal and Social Problem," 16 Crime and Delinquency 139-50 (1970).

Torigian, J., "Sims v. State Department of Public Welfare: Constitutional Limitations of Child Abuse Legislation," 19 South Texas L.J. 491-500 (1979).

Thomas, E.K., "Child Neglect Proceedings: A New Focus," 50 Indiana L.J. 60-81 (Fall, 1974).

Thomas, H.W., "Low Intelligence of the Parents: A New Ground for State Inteference with the Parent-Child Relationship," 13 Journal of Family Law 379-91 (1974).

Wald, M., "State Intervention on Behalf of Neglected Children: A Search for Realistic Standards," 27 Stanford L. Rev. 985-1040 (April 1975).

Note: "Constitutional Limitations on the Scope of State Child Neglect Statutes," 79 Columbia L. Rev. 719-34 (1979).

Note: "Child Maltreatment: An Overview of Current Approaches," 18 Journal of Family Law 115-45 (1979).

Note: "Foster Placement Review: Problems and Opportunities," 83 Dickinson L. Rev. 487-513 (1979).

Central Registry

Besharov, Douglas, J., "Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services," 54 Chicago-Kent L. Rev. 687-752 (1978).

Criminal Liability

Cohen, Harriette, "Criminal Liability of Parent for Omission Causing Death of Child," 21 Maryland L. Rev. 263-68 (1961).

Frank, Robert G., "Criminally Enforceable Duty to Act," 18 Washington and Lee L. Rev. 311-16 (1961).

Rosenthal, M.P., "Physical Abuse of Children by Parents: The Criminalization Decision," 7 Amer. Journal of Criminal Law 141-69 (1979).

Plaine, L.L., Comment: "Evidentiary Problems in Criminal Child Abuse Prosecutions," 63 Georgetown L.J. 257 (1974).

Utsinger, Barry D., "Murder Without Malice: Fatal Child Abuse as Felony Murder - People v. Shockley," 2 Crim. Just.Journal 1-13(1978).

Evidence

Burke, K.M., "Evidentiary Problems of Proof in Child Abuse Cases: Why Family and Juvenile Courts Fail," 13 Journal of Family Law 819-52 (1974).

Miller, L.M., "Principles of Res Ipsa Loquitur Apply to Proof of Child Abuse and Neglect," 9 Tex. Tech L. Rev. 335-42 (Winter,1977).

Prince, R.C., "Evidence, Child Abuse, Expert Medical Testimony Concerning 'Battered Child Syndrome' Held Admissible," 42 Fordham L. Rev. 935-43 (1974).

Stimson, D.C., "Evidence-Privileges: Husband and Wife-Exception for Offenses Against Spouses Applies to Crimes Against Child of Either Spouse," 45 Univ. Cin. L. Rev. 304-10 (1976).

Failure To Report - Civil Liability

Clymer, J.N., "The Battered Child - A Doctor's Civil Liability for Failure to Diagnose and Report," 16 Washburn L.J. 543-51(Winter,1977).

Hannig, J., "Physicians and Surgeons-Infants-Physician's Liability for Noncompliance with Child Abuse Reporting Statute," 52 North Dakota L. Rev. 736-44 (Summer, 1976).

Issacson, L.B., "Child Abuse Reporting Statutes: The Case for Holding Physicians Civilly Liable for Failure to Report," 12 San Diego L. Rev. 743-77 (July, 1975).

Kohlman, R.J., "Malpractice Liability for Failing to Report Child Abuse," 49 Calif. State Bar J. 118-23 (March-April, 1974).

McDonald, R.A., "Civil Actions Against Physicians for Failure to Report Cases of Suspected Child Abuse," 30 Okla. L. Rev. 482-90 (Spring, 1977).

Mazura, A.C., "Negligence-Malpractice-Physician's Liability for Failure to Diagnose and Report Child Abuse," 23 Wayne L. Rev. 1187-1201 (March, 1977).

Maidment, S., "Some Legal Problems Arising Out of the Reporting of Child Abuse," Current Legal Problems at 149-75 (1978).

Foster Care

American Public Welfare Association, "Standards for Foster Family Service Systems," Amer. Pub. Welfare Assn: Washington,D.C.(1975).

Bernstein, B., "A Preliminary Report: Foster Care Needs and Alternatives to Placement," New York Board of Social Welfare: New York (1975).

Carrieri, Joseph R., "The Foster Child: From Abandonment to Adoption," (1980).

Fanshel, David, "Parental Visitation of Children in Foster Care: Key to Discharge?," Vol. 49, Social Services Review (1975).

Fanshel, David and Shinn, Eugene, "Dollars and Sense in Foster Care," Child Welfare League of America: New York (1972).

Festinger, "The New York Court Review of Children in Foster Care," Vol. 54, Child Welfare (1975).

Gambrill, Eileen and Wiltse, Kermit, "Foster Care: The Use of Contracts," Vol. 32, Public Welfare (1974).

Mnookin, Robert, "Foster Care- In Whose Best Interest?," Vol. 43, Harvard Education Review (Nov., 1973).

Phillips, Michael; Shyne, Ann; Sherman, Edmund; and Haring,Barbara, "Factors Associated With Placement Decisions in Child Welfare," Child Welfare League of America: New York (1971).

Shapiro, Dorothy, "Agency Investment in Foster Care: A Follow-Up," Vol. 18, Social Work (Nov., 1973).

Stone, Helen (ed.), "Foster Care in Question," Child Welfare League of America: New York (1970).

Sutton, P.U., "The Fundamental Right to Family Integrity and Its Role in New York Foster Care Adjudication," 44 Brooklyn L. Rev. 63-115 (Fall, 1977).

Wald, Michael, "State Intervention on Behalf of 'Neglected Children': Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care and Termination of Parental Rights," 28 Stanford L. Rev. (April, 1976).

Weinstein, Eugene, "The Self-Image of the Foster Child," Russell Sage Foundation: New York (1960).

Neglect

Dembitz, N., "Preventing Youth Crime by Preventing Child Neglect," 65 Amer. Bar Assn J. 920-23 (1979).

Katz, S.; Howe, R., and McGrath, M., "Child Neglect Laws in America," 9 Family Law Quarterly (Spring, 1975).

Neff, Michael, Permanent Neglect Proceedings (1980).

Tamilia, Patrick R., "Neglect Proceedings and the Conflict Between Law and Social Work," 9 Duquesne L. Rev. 579-89 (1971).

Wald, M., "State Intervention on Behalf of Neglected Children: A Search for Realistic Standards," 27 Stanford L. Rev. (April, 1975).

Note: "Psychological Parents v. Biological Parents: The Courts' Response to New Directions in Child Custody Dispute Resolution," 17 Journal of Family Law 545-76 (1979).

Note: "Retarded Parents in Neglect Proceedings: The Erroneous Assumption of Parental Inadequacy," 31 Stanford L. Rev. 785-805 (1979).

Reporting Statutes

Brown, Rowine H., "Child Abuse: Attenpts to Solve the Problem by Reporting Laws," 60 Women Lawyers Journal 73-78 (1974).

Donovan, Thomas J., :Legal Responses to Child Abuse," 11 William and Mary L. Rev. 960-87 (1970).

Fraser, Brian G., "A Glance at the Past, A Gaze at the Present, A Glimpse of the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes," 54 Chicago-Kent L. Rev. 641-86(1978).

Paulson, Monrad, "Child Abuse Reporting Laws: The Shape of Legislation", 67 Columbia L. Rev. (Jan., 1967).

Rights of Children

Beck, Connie, K; Glavis, Greta; Glover, Susan; Jenkins, Mary B.& Nardi, Richard A., "The Rights of Children: A Trust Model," 46 Fordham L. Rev. 668-780 (1978).

Bricker, S.W., "Children's Rights: A Movement in Search of Meaning," 13 Univ. of Richmond L. Rev. 661-93 (1979).

Bross, Donald C., "Legal Advocacy for the Maltreated Child," 14 Trial 29-32 (1978).

Foster, H. and Freed, D., "A Bill of Rights for Children," 6 Family Law Quarterly (Winter, 1972).

Weinstein, Noah, "Legal Rights for Children," National Convention of Judicial Court Judges: Reno, Nevada (1974).

Rights of Parents

Ashman, Alan, "Right to Counsel...Child Custody," 63 Amer. Bar Assn J. 1472-73 (1977).

Duncan, Elaine C., "Recognition and Protection of the Family's Interests in Child Abuse Proceedings," 13 Family Law Journal 803-18 (1974).

Krause, Harry D., "Child Welfare, Parental Responsibility, and the State," 6 Family Law Quarterly 377-403 (1972).

Note: "In the Child's Best Interests: Rights of the Natural Parents in Child Placement Proceedings," 51 N.Y.U. L. Rev. 446-77 (1976).

Note: "Neglect Proceedings - Indigent Parent(s) Must Be Advised on the Availability of Free Legal Counsel," 1 Hofstra L. Rev. 324-31 (1973).

Rights to Counsel - Due Process

Bricker, S.W., "Summary Removal of Children in Abuse and Neglect Cases: The Need for Due Process Protection," 2 Family Law Reporter 4037-41 (May 11, 1976).

Catz, R.S.; Kuelbs, J.T., "The Requirement of Appointment of Counsel for Indigent Parents in Neglect and Termination Proceedings: A Developing Area," 13 Journal of Family Law 223-44 (1973-4).

Garvey, "Child, Parent, State and the Due Process Clause: Ah Essay on the Supreme Court's Recent Work," 51 S. Cal. L. Rev. 769 (July, 1978).

Kaplan, E.N., "Appointment of Counsel for the Abused Child - Statutory Schemes and the New York Approach," New York State Assembly Select Committee on Child Abuse Report, 58 Cornell L. Rev. 177-90 (1972-3).

Milmed, "Due Process for Children: A Right to Counsel in Custody Proceedings," 4 N.Y.U. L. Rev. of Social Change 177 (Spring, 1974).

Note: "Right to Counsel...Child Custody," 63 Amer. Bar Assn J. 1472-73 (Oct., 1977).

Note: "Child Neglect: Due Process for the Parent," 70 Columbia L. Rev. 465-85 (March, 1970).

Note: "Recommendation for Court-Appointed Counsel in Child Abuse Proceedings," 13 Family Law Journal 803-13 (1973-74).

Sexual Abuse

Baker, C. David, "Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution, 5 Pepperdine L. Rev. 809-46 (1978).

Benward, Jean, and Densen-Gerber, Judianne, "Incest as a Creative Factor in Anti-Social Behavior: An Exploratory Study," Contemporary Drug Problems 4:323-40 (1974).

Daugherty, Mary K., "The Crime of Incest Against the Minor Child and the State's Statutory Responses," 17 Family Law Journal 93-113 (1978).

Densen-Gerber, Judianne; Hutchinson, Stephen F.; and Levine, Ruth M., "Incest and Drug-Related Child Abuse: Systematic Neglect by the Medical and Legal Professions," Contemporary Drug Problems, 6: 135-72 (1977).

Holder, Wayne M. (ed.), "Sexual Abuse of Children: Implications for Treatment," The American Humane Society: Child Protections Division (1980).

Payton, Jennifer, "Child Pornography Legislation," 17 Family Law J. 505-43 (1979).

Note: "Incest and the Legal System: Inadequacies and Alternatives," 12 U.C.D. L. Rev. 673-99 (1979).

Standard of Proof

Bowers, W.C., "Does Due Process Require Clear and Convincing Proof Before Life's Liberties May Be Lost?," 24 Emory L.J. 105-50 (1975).

White, M.F., "Dependency Proceedings: What Standard of Proof? - An Argument Against the Standard of 'Clear and Convincing," 14 San Diego L. Rev. 1155-75 (July, 1977).

State Law

Albstein, Iris A., "Child Abuse and Maltreatment: The Development of New York's Child Protection Laws," 5 Fordham Urban L.J. 533-47 (1977).

Carrieri, J.R., "Development and Expansion of New York's Permanent Neglect Statute," 5 Fordham Urban L.J. 419-34 (Spring,1977).

Insero, Pete P., "Child Protection Proceedings Under Article 10 of the New York Family Court Act," 20 Buff. L. Rev. 561-66 (1971).

Schwartz, B.A., "A Reappraisal of New York's Child Abuse Law: How Far Have We Come?," 13 Columbia Journal of Law and Social Problems 91-136 (1977).

Smith, Jack L., "New York's Child Abuse Laws: Inadequacies in the Present Statutory Scheme," C 55 Cornell L. Rev. 298-305 (1970).

Note: "An Appraisal of New York's Statutory Response to the Problem of Child Abuse," 7 Columbia Journal of Law and Social Problems 51-74 (Winter, 1971).

Note: "Child Abuse and Maltreatment: The Development of New York's Child Protective Laws," 5 Fordham Urban L.J. 533-47 (Spring, 1977).

Termination of Parental Rights

Bergman, N.W., "Family Law-Termination of Parental Rights-A New Standard for Balancing the Rights of Parents, Children and Society," 24 Emory L.J. 183-94 (Winter, 1975).

Boskey, J., "Alternative Standards for the Termination of Parental Rights," 9 Seton Hall L. Rev. 1-46 (1978).

Day, D.S., "Termination of Parental Rights Statutes and the Void For Vagueness Doctrine: A Successful Attack on the Parens Patriae Rationale," 16 Family Law Journal 213-38 (1977-78).

Gordon, "Terminal Placements of Children and Permanent Termination of Parental Rights: The New York Neglect Statute," 46 St. Johns L. Rev. 215 (1971).

Katz, S.N., "Freeing Children for Permanent Placement Through a Model Act," 12 Family Law Quarterly 203 (Fall, 1978).

Ketcham, O.W.; Babcock, R.F.,Jr., "Statutory Standards for the Involuntary Termination of Parental Rights," 29 Rutgers L. Rev. 530-56 (Spring, 1976).

Kiser, W.D., "Termination of Parental Rights - Suggested Reforms and Responses," 16 Family Law Journal 239-64 (1977-78).

Rogers, S.R., "The State vs. the Family: Does Intervention Really Spare the Child?," 28 Mercer L. Rev. 547-52 (Winter, 1977).

Note: "Proceeding to Terminate Parental Rights: Too Much or Too Little Protection for Parents?," 16 Santa Clara L. Rev. 337-58 (Spring, 1976).

Note: "Termination of Parental Rights and the Lesser Restrictive Alternative Doctrine," 12 Tulsa L.J. 528-44 (1977).