

# Abolish the Family Court

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## I. INTRODUCTION

It is time to recognize that the New York City Family Court has been, continues to be, and will always be, a dismal failure. Throughout its forty-five years of existence, the Family Court has been studied, critiqued, criticized, and tinkered with. Yet the Court has shown a remarkable ability to resist most minor and any major changes. The same problems and the same suggestions for improvement that were noted forty years ago are still there, reappearing with every new report.<sup>1</sup> The Family Court was established as an "inferior court," and it has lived up (or down) to its classification. Perpetually underfunded and overcrowded, staffed by inexperienced, overloaded, and unprepared attorneys and despairing judges, and lacking the authority and the will to make and enforce orders necessary to carry out its mandate, the Family Court is so permeated with the culture of helplessness and failure that it can never be rooted out.<sup>2</sup>

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1. See generally LIBERTY ALDRICH ET AL., CTR. FOR COURT INNOVATION, NEW YORK CITY FAMILY COURT: BLUEPRINT FOR CHANGE (2004); N.Y. STATE SENATE COMM. ON CHILD CARE, CHILD PROTECTION AND THE FAMILY COURT: A STUDY OF PROCESSES, PROCEDURES AND OUTCOMES UNDER ARTICLE TEN OF THE NEW YORK FAMILY COURT ACT (1989).

2. SPECIAL CHILD WELFARE ADVISORY PANEL OF THE ANNIE E. CASEY FOUNDATION, ADVISORY REPORT ON FRONT LINE AND SUPERVISORY PRACTICE 44-48 (2000) available at Education Resources Information Center, [www.eric.ed.gov](http://www.eric.ed.gov), (ED439189) [hereinafter ADVISORY REPORT].

The Family Court is a court of limited jurisdiction and authority.<sup>3</sup> Although section 255 of the New York Family Court Act gives the Court the power to order governmental agencies to provide services needed by the families before the Court, appellate decisions have interpreted the language of the statute to eviscerate this power.<sup>4</sup> The Family Court is limited in its power to direct child protective services and foster care agencies to place children in specific homes. The courts have severely restricted the authority of the Family Court to hold agencies in contempt for violation of orders.<sup>5</sup> And the Court lacks even the ability to sanction the public agencies for failure to appear in court for trials.<sup>6</sup>

The Family Court is generally a place that people want to escape. Judges move from family court to supreme court and federal court, but almost never the other way. Attorneys start out in the Family Court. Most move on if they can, with the exception of the permanent corps of assigned counsel, many of whom provide woefully incompetent representation to their clients.<sup>7</sup>

## II. CHILD PROTECTIVE PROCEEDINGS

The Family Court deals with many important issues, but none are more important than child protective proceedings. An erroneous decision not to intervene can result in the neglect, abuse, or even death of a child at home. On the other hand, a mistaken decision to remove a child to foster care will result in the trauma

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3. N.Y. FAM. CT. ACT § 255 (McKinney 2007).

4. See, e.g., *In re Ronald W.*, 801 N.Y.S.2d 312, 316–17 (N.Y. App. Div. 2005); *In re Enrique R.*, 512 N.Y.S.2d 837 (N.Y. App. Div. 1987); *In re Tiffany A.*, 703 N.Y.S.2d 381, 384–85 (N.Y. Fam. Ct. 2000), *aff'd*, 723 N.Y.S.2d 859 (N.Y. App. Div. 2001); *New York City Housing Authority v. Miller*, 390 N.Y.S.2d 806, 809 (N.Y. Sup. Ct. 1977), *aff'd*, 401 N.Y.S.2d 992 (N.Y. App. Div. 1978).

5. *In re Ida Luz M.*, 502 N.Y.S.2d 923, 925 (N.Y. Fam. Ct. 1986); see also *In re Murray*, 469 N.Y.S.2d 747 (N.Y. App. Div. 1983).

6. See, e.g., *In re Ismael M.*, 770 N.Y.S.2d 31 (N.Y. App. Div. 2003); *In re Jasmine S.*, 768 N.Y.S.2d 194 (N.Y. App. Div. 2003).

7. SANCTUARY FOR FAMILIES AND LAWYERS' COMMITTEE AGAINST DOMESTIC VIOLENCE, CRISIS IN INDIGENT REPRESENTATION IN THE FAMILY COURTS (2000); MARK GREEN, PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, JUSTICE DENIED: THE CRISIS IN LEGAL REPRESENTATION OF BIRTH PARENTS IN CHILD WELFARE PROCEEDINGS (MAY 2000); PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, A DANGEROUS CYCLE: ATTORNEY TURNOVER AT ACS LEAVES CHILDREN UNPROTECTED (2006), available at [http://pubadvocate.nyc.gov/policy/ACSAttorneyReportSeptember2006\\_000.pdf.pdf](http://pubadvocate.nyc.gov/policy/ACSAttorneyReportSeptember2006_000.pdf.pdf); ADVISORY REPORT, *supra* note 2, at 44–48.

of removal, separation, and instability. After removal, children risk the same degree of neglect and abuse in foster care.<sup>8</sup> In this arena, the most fundamental constitutional (indeed, pre-constitutional)<sup>9</sup> rights are at stake.

The child protective article of the Family Court Act was established to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being. The statute is "designed to provide a due process of law for determining when the state, through its Family Court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met."<sup>10</sup> The Family Court and the child welfare system at large have failed to adequately satisfy any aspect of that mandate.

#### A. PROTECTION

Protection is a major concern of all components of the Family Court and child welfare system. But in reality, the protection of the system itself frequently overshadows the protection of children. Judges have an incentive to protect themselves from the periodic media hysteria that results from the death of a young child at the hands of a brutish parent. Judges also look to protect their jobs; in New York City, the person who appoints prosecutors for child protective cases is the same person who decides if the

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8. See, e.g., *Doe v. N.Y. City Dep't of Soc. Servs.*, 649 F.2d 134 (2d Cir. 1981) (foster child repeatedly raped by foster father); *Thomas v. City of New York*, 814 F. Supp. 1139 (E.D.N.Y. 1993) (5 children physically and sexually abused in foster care); *Mark G. v. Sabol*, 717 N.E.2d 1067 (N.Y. 1999) (allegations of abuse and neglect in foster homes); *Sean M. v. City of New York*, 795 N.Y.S.2d 539, (N.Y. App. Div. 2005) (children suffered physical and sexual abuse in several different foster homes); Maki Becker et al., *Girl Dumped With Garbage: Foster Mom Arrested in Death*, N.Y. DAILY NEWS, July 10, 2003, at 6; *From Foster Care to Courts: 8-year-old Suing City, Agency, Citing Severe Injury, Neglect*, N.Y. DAILY NEWS, Feb. 20, 2001, at 24 (physical abuse of foster child, causing brain damage); *The Shame of Foster Care*, TIME, Nov. 13, 2000 (cover story on child abuse in foster care); *City foster care sex abuse complaints up*, N.Y. DAILY NEWS, Dec. 28, 1994; *Bronx Woman Held in Death of a Foster Child, 22 Months*, N.Y. TIMES, July 4, 1990, at 35; Robert D. Mcfadden, *Tragic End to Adoption of Crack Baby*, N.Y. TIMES, June 19, 1990, at B1 (foster mother admitted killing her foster child);

9. See *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (describing "the fundamental right of parents to make decisions concerning the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests recognized by this Court"); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

10. N.Y. FAM. CT. ACT § 1011 (McKinney 2007).

judges will be reappointed.<sup>11</sup> Law guardians and ACS staff and attorneys similarly seek to protect themselves and their agencies from the criticism that occurs when they side with a family. And assigned counsel has an incentive to protect their case assignments by not fighting too hard in court and by not taking action against abusive judges. The protection of the child often gets lost in the mix.

But even when concern for the child rises above these perverse incentives, the Family Court rarely acts to protect the child. The initial hearings and the fact-finding hearing all concern *past* activity. To the contrary, the sole issue should be whether the child, now under the supervision of the Court, will be neglected or abused in the *future*. Neither ACS nor Family Court judges nor law guardians have any reliable way of making that determination. So parents (and their children) are punished for past activity because it is presumed to be an accurate predictor of future activity.

## B. WELL-BEING

Few would claim that children's well-being is safeguarded by prolonged proceedings and outrageously long stays in foster care. Yet, the delays in the Family Court are legendary.<sup>12</sup> There is no need to assign blame; by its nature, it seems that the Family Court will always generate enormous delays. In a functional, efficient court, judges do not spend half of their time negotiating trial dates with attorneys; the judges announce the dates, the attorneys appear, and the trial commences and continues until it is completed. If parties fail to produce required discovery or reports, they are sanctioned. But the Family Court has neither the authority nor the will power to impose such sanctions.<sup>13</sup> Thus, the delays and systemic failures continue.

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11. N.Y. CONST. art. VI, § 13(a).

12. OFFICE OF COURT ADMINISTRATION, STATE OF NEW YORK, FAMILY COURT STATISTICS, TWENTY-FOURTH ANNUAL REPORT, VOL. II (2001); Martin Guggenheim & Christine Gottlieb, *Justice Denied: Delays in Resolving Child Protection Cases in New York*, 12 VA. J. SOC. POL'Y & L. 546 (2005); PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, FAMILIES AT RISK: A REPORT ON NEW YORK CITY'S CHILD WELFARE SERVICES 28-29 (2002); *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002); ADVISORY REPORT, *supra* note 2, at 44-45.

13. See cases cited *supra* notes 5, 6.

### C. PREVENTIVE SERVICES

Federal and state law require that child protective services and foster care agencies provide preventive services to help avoid foster care or to bring it to an end.<sup>14</sup> In order to receive reimbursement for foster care services (federal funds for the state, state funds for the locality), the Family Court must find that the agency made reasonable efforts to avoid or shorten foster care or that such services were not appropriate.<sup>15</sup> Such a finding requires a hearing and an inquiry into the facts. In New York, both CPS and foster care agencies frequently fail to make reasonable efforts to minimize the use of foster care.<sup>16</sup> Nevertheless, the Family Court, under pressure from the state government, almost invariably issues orders finding such efforts. The Court does so in order to enable New York to continue to receive federal funds. The state argues that this money is needed to help the children. I argue that the state and local government would continue to fund foster care regardless of reimbursement, while the failure to provide real scrutiny of the agencies' reliance on foster care is a disservice to the children involved.

### D. DUE PROCESS

Due process of law requires clear rules, government adherence to those rules, speedy trials, adequate legal representation for all parties, impartial decision makers, and an appellate process.<sup>17</sup> In practice, the Family Court provides none of these. The lack of speedy trials and adequate legal representation has been well

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14. 42 U.S.C. § 671(a)(15); N.Y. SOC. SERV. LAW §§ 409, 409-a; 18 N.Y.C.R.R. §§ 423.2, 430.9.

15. *Id.*

16. *See, e.g.*, COMPTROLLER OF THE STATE OF N.Y., DRAFT REPORT, CHILDREN IN FOSTER CARE AT VOLUNTARY AGENCIES NOT RECEIVING ALL REQUIRED SERVICES, No. A-18-92, (March 18, 1994); CLAUDE B. MEYERS, ACTING COMMISSIONER OF ACS (THEN KNOWN AS CWA), RESPONSE TO DRAFT REPORT (April 25, 1994); COMPTROLLER OF THE STATE OF N.Y., FINAL REPORT, CHILDREN IN FOSTER CARE AT VOLUNTARY AGENCIES NOT RECEIVING ALL REQUIRED SERVICES, No. A-18-92, (May 24, 1994); COMPTROLLER OF THE STATE OF N.Y., FOLLOW-UP REPORT, CHILDREN IN FOSTER CARE AT VOLUNTARY AGENCIES NOT RECEIVING ALL REQUIRED SERVICES, (March 6, 1996).

17. *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

documented.<sup>18</sup> Likewise, there are no clear rules to guide crucial decisions. At what age can a parent leave a child alone? For how long? What kind of corporal punishment is excessive? In the absence of clear rules and education for parents, the subjective opinion of the judge controls.

Other grave due process problems pervade the Family Court, as well. Unlike the rules of parenting, the rules of evidence are clear from statutes and case law. But too often the Family Court simply ignores them. In my experience, hearsay, rumor, and suspicion, no matter how unreliable, are often admitted. Further questions arise as to the impartiality of Family Court judges. In New York City, Family Court judges are appointed by the Mayor, who is also the overall director of the child protective service that prosecutes the cases.<sup>19</sup> How impartial can a judge appointed by the prosecutor be? It is no wonder that Family Court judges rule for ACS in 99% of fact-finding hearings, according to the figures of the Office of Court Administration.<sup>20</sup>

These due process violations are compounded by the lack of effective appellate review. The appellate courts have made review largely meaningless, often ignoring pervasive violations of the Constitution, New York statutory and decision law, and rules of evidence as harmless error.<sup>21</sup> But errors that undercut the rule of law are not harmless. Moreover, the appellate courts have se-

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18. See *Nicholson v. Williams*, 203 F. Supp. 3d 153 (E.D.N.Y. 2002).

19. N.Y. CONST. art. VI § 13(a); N.Y. FAM. CT. ACT §§ 1012(i), 1032(a) (McKinney 2007); N.Y. SOC. SERV. LAW § 398(2)(a) (McKinney 2007). The same fundamental flaw applies to delinquency proceedings: the Mayor whose agencies prosecute the cases is the same person who appoints the judges to hear those cases. N.Y. FAM. CT. ACT §§ 254(a), 301.2(12) (McKinney 2007). As with child protective proceedings, impartiality and basic fairness are impossible to guarantee in delinquency proceedings.

20. OFFICE OF COURT ADMINISTRATION, *supra* note 12.

21. See *In re Shawndalaya II.*, 818 N.Y.S.2d 330 (N.Y. App. Div. 2006) (failure to advise mother of the charges against her); *In re Christina A.M.*, 815 N.Y.S.2d 871 (N.Y. App. Div. 2006) (admitting evidence of prior accusations of abuse by the father); *In re Demetrius B.*, 813 N.Y.S.2d 611 (N.Y. App. Div. 2006) (admitting evidence of prior accusations of abuse by the father); *In re Daniel BB.*, 809 N.Y.S.2d 303 (N.Y. App. Div. 2006) (admitting evidence that father failed a polygraph test regarding the allegations against him in the petition); *In re Leroy C., Jr.*, 805 N.Y.S.2d 61 (N.Y. App. Div. 2005) (mother's attorney failed to appear on two days of the trial, at which witnesses testified); *In re Stephanie R.*, 799 N.Y.S.2d 804 (N.Y. App. Div. 2005) (trial court refused to admit evidence that child had recanted her accusations); *In re James V.*, 754 N.Y.S.2d 506 (N.Y. App. Div. 2003) (trial court permitted attorney for a non-party to question witnesses); *In re Nicole VV.*, 746 N.Y.S.2d 53 (N.Y. App. Div. 2002) (trial court admitted hearsay evidence of 25 previous accusations of child neglect against mother).

verely limited the Family Court's ability to order agencies of all kinds to meet children's needs, and has straight-jacketed the Court's ability to enforce its own orders. The appellate decisions are a clear violation of the legislative intent.

Much of this situation may be caused by the Family Court statute, which, instead of positioning the Court as a buffer between the state and the family, makes the Family Court itself the intervener: "the state, through its family court, may intervene. . .

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### III. OTHER FAMILY COURT PROCEEDINGS

Foster care and juvenile delinquency proceedings are susceptible to a similar critique. For instance, the Legislature has repeatedly found that the foster care system does not work in children's interests, and has assigned the Family Court to solve the problem through reports, hearings, and orders.<sup>23</sup> Unfortunately, courts are not good administrative agencies, and the overcrowded and underpowered Family Court has responded by holding adjournments instead of hearings and issuing orders that it cannot enforce. The Legislature has responded by requiring even more frequent hearings and lengthier reports. The results will be the same.

### IV. RECOMMENDATIONS

- Set clear minimum standards for parents so that they can know what is expected of them and so they can conform to those expectations. Tell parents at what age they can leave their children alone and for how long.<sup>24</sup>

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22. N.Y. FAM. CT. ACT §§ 141, 1011 (McKinney 2007).

23. See the legislation enacted in N.Y. SOC. SERV. LAW §§ 258-a & 392, and N.Y. FAM. CT. ACT art. 10 (Part 5) & art. 10-A.

24. Educating parents will benefit children because the children will not be left alone when they should not be. The child protective process will also benefit. Presently, we do not know whether a parent is truly uncaring and negligent, or is simply doing her best within an ambiguous system. The latter parent should not lose custody, since she will comply with the rules once she knows them. Clear rules will also remove some of the power from caseworkers who impose their own views on families.

- Remove child protective proceedings and contested post-dispositional proceedings from the Family Court to the supreme court.<sup>25</sup>
- Rotate justices into child protective parts so that they do not become entrenched in the system.
- Transfer routine reviews of foster care placements to independent citizen review boards.
- Transfer juvenile delinquency proceedings to the criminal courts.
- Allow respondents in child protective, termination of parental rights, and juvenile delinquency proceedings to elect trial by jury.<sup>26</sup>
- Transfer all custody, visitation, support, and paternity cases to the Supreme Court matrimonial parts.
- If any part of the Family Court is kept, change the system for appointing Family Court judges so that the Mayor's agencies are not responsible for both appointing judges and prosecuting child protective proceedings.<sup>27</sup>

## V. CONCLUSION

Albert Einstein defined insanity as doing the same thing over and over and expecting a different result. Unfortunately, the reports produced by this conference are simply more of the same. All the working groups agree. They speak of inadequate resources, lack of communication and transparency, insufficient data, and the shortage of, and limitations of, Family Court judges. The main solutions proposed will not be implemented. Collecting more data will just confirm what we already know. The Legislature is not going to provide more judges. And judges are not going to let litigants judge them. The minor recommendations are also rehashes, and they will not make any meaningful

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25. The Family Court will never receive adequate funding or authority to properly handle these cases. Supreme court will be able to obtain greater resources and the supreme court's powers are not limited the way the Family Court's are. Supreme court justices are accustomed to a higher standard of practice and will require it of attorneys.

26. A jury will not feel political pressures in the same way a judge does. See Melissa L. Breger, *Introducing the Construct of the Jury into Family Violence Proceedings and Family Court Jurisprudence*, 13 MICH. J. GENDER & L. 1, 23-24 (2006).

27. New York City is the only jurisdiction in the United States in which the prosecutor appoints and reappoints the judges.

change. The Family Court just does not work. It is time to stop the insanity, demolish this failed institution, and try something else.