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December1, 2016

John McConnell, Esq.
Office of Court Administration
25 Beaver Street, 11th floor
New York, New York 10004

Dear Mr. McConnell:

The Women's Bar Association of the State of New York (WBASNY), an association with more than 4,400 members across our state, has reviewed the proposal to amend 22NYCRR 205.5 regarding privacy of Family Court records that was circulated for public comment by your memorandum dated October 6, 2016.

Although information about orders of protection and orders of disposition may sometimes be relevant to the department of corrections and community supervision or the probation department ("probation") when such department is supervising a parent or intervenor in an article 10 proceeding, the proposed rule is overly broad and could lead to a fishing expedition. We also have concern that the rule might open the door to mutual exchanges of information between probation and the child protective agency or local department of social services involved in the Article 10 or 10-a proceeding. To protect against unwarranted disclosure under this rule, but still allow probation access to important information which could protect children from harm, WBASNY recommends the following revisions to the rule:

First, disclosure of orders should be conducted under the supervision of a Family Court judge to guard against mutual exchanges of information between probation and other agencies involved in the child protective proceeding and to make sure that only those orders authorized by the rule are provided to probation.

Second, disclosure should be limited to final orders of protection or parental access (visitation, custody, parenting time) to which the final order of protection is subject, and final orders of disposition in the child protective proceeding. Temporary orders of any kind, whether temporary orders of protection under Article 10 or under any other Article of the Family Court Act, the Domestic Relations Law, or the Criminal Procedure Law, or temporary orders of any kind issued in the Article 10 proceeding, should not be disclosed to probation because they are often issued ex parte without a fact finding hearing or an admission on consent that justifies a finding of an act of domestic violence or of abuse or neglect. [1] Even where a child has been removed because of imminent risk pending outcome of the case after a Section 1027 or 1028 hearing has taken place, a full fact finding hearing which supports the finding of abuse or neglect will not have occurred yet.

[1] See N.Y. Fam. Ct. Act §§ 832, 1044, 1046 (McKinney).

Third, it should be made clear that nothing in the rule entitles a child protective agency or department of social services involved in the article 10 or 10-a proceeding to access any probation records regarding the parent or legally responsible person being supervised.

Fourth, the provision in the proposed rule allowing probation to redisclose orders they obtain when necessary for supervision is too vague and leaves it up to probation to determine when redisclosure is necessary. Redisclosure should not be at the sole discretion of probation, but rather upon permission of the court.

With the foregoing changes, subsection (f) of the rule would be revised to read as set forth below.

Section 205.5 Privacy of Family Court records.

Subject to limitations and procedures set by statute and case law, the following shall be permitted access to the pleadings, legal papers formally filed in a proceeding, findings, decisions and orders and, subject to the provisions of CPLR 8002, transcribed minutes of any hearing held in the proceeding:

(f) Under the supervision of the Family Court in an article ten or ten-a proceeding, the department of corrections and community supervision or a local department of probation when the department is supervising the parent or other person legally responsible for the care of a child who is the subject of a proceeding under article ten or ten-a of the family court act: provided, however, that access under this subdivision shall be limited to [temporary and] final orders of protection and any access orders to which the final order of protection is subject, and any final orders of disposition in the proceeding, that are in effect that relate to such parent or other person legally responsible; and provided further that court orders disclosed pursuant to this subdivision must be retained as confidential and may not be redisclosed except as permitted by the court [necessary for such supervision]; and that nothing herein shall entitle a child protective agency or department of social services involved in the article 10 or article ten-a proceeding to access any records of the department of corrections and community supervision or a local department of probation regarding such parent or other person legally responsible.

Thank you for your kind review and work on behalf of the courts and all its litigants.

Sincerely,

Jacqueline P. Flug
President, WBASNY

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December 5, 2016

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Dear Mr. McConnell,

Please be advised this office is opposed to the proposed addition Paragraph (f) of 22 NYCRR §205.5 for the following reasons:

1) It appears to be in contravention of New York's Family Court Act §166 which states only the Court can authorize that the appropriate parties be granted disclosure at its discretion. Any change should be brought legislatively by statute, and not by administrative change.

2) The orders of protection necessarily include special orders and conditions for the court. Disclosure **must** include a finding of necessity to permit disclosure and to have the oversight of the court. (Please see, Matter of Sarah F., 18 AD3d 1072) The basis for this is simple and straightforward, the court and the parties can determine if the disclosure is in fact necessary after all of the parties are heard.

3) Each of the other provisions sets forth some manner of judicial oversight, this provision does not allow for any oversight by the court, which is problematic in my view.

The goal of the amendment is laudable, but without a requirement to have judicial latitude and permission to release the information, then such release can (and I believe will) lend itself to unforeseen collateral consequences for the parent, or other person legally responsible for the child. This undoubtedly will cause harmful consequences for the entire family.

Accordingly, I recommend that the Administrative Board of the Courts or the Office of Court Administration *reject* the amendment as written.

Very truly yours,

Clare J. Degnan
Executive Director

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MEMORANDUM

TO: New York State Unified Court System, Office of Court Administration
John W. McConnell, Counsel at the Office of Court Administration

DATE: December 5, 2016

RE: Comments on proposed rule change, 22 NYCRR § 205.5

This memo offers comments on the proposed amendment of 22 NYCRR § 205.5 to add "the department of corrections and community supervision or a local department of probation" as entities that are authorized to have automatic access to Family Court records when they are supervising a parent whose child is the subject of a Family Court Act Article 10 proceeding. The Request for Public Comment Memo from the Office of Court Administration accompanying the proposed amendment does not mention any limitation on the type of records to be distributed. But the proposal (proposed section "f" of 22 NYCRR § 205.5) contemplates that access by the Department of Corrections and Community Supervision (DOCCS) and probation departments to Family Court records will be "limited to temporary and final orders in effect ...." This memo focuses on the formal proposal, but also notes concerns with giving DOCCS and probation departments broader or unlimited access. We appreciate this opportunity to comment on the proposal.

I. Family Court Records Confidentiality Serves an Important Purpose

The majority of Family Courts around the country are not open to the public for a myriad of reasons, not least of which is protection for the privacy of and dignity for families involved in abuse or neglect proceedings. In an effort to engender trust in our system, New York and a minority of other states have chosen to make Family Courts open to the public. But the openness of New York Family Courts has limits. As a counterbalance to the open-court policy, New York law requires that Family Courts keep records confidential, except in limited circumstances, so that Family Court participants can trust and fully engage with providers and in the matter. As noted by Merril Sobie in his Practice Commentaries, "access to Family Court records is by no means automatic." Sobie, Practice Commentary, McKinney's Consolidated Laws of NY, 2016 Cumulative Pocket Part, FCA § 166.

One key statutory provision is FCA § 166, which prohibits "indiscriminate public inspection" of Family Court records and allows the court, in its sole discretion, to allow discrete inspection on a case-by-case basis. FCA § 166 further allows automatic access for institutions "**to which a child is committed** ..." (Emphasis added). There is no exception in FCA § 166 that allows automatic (as opposed to a specific and targeted request submitted to a court for a final decision) access for other institutions or agencies to which an adult (a parent) is committed or that are otherwise supervising an adult who is a party to the Family Court proceeding.

II. The Proposed Amendment Offers No Evidence to Support the Claim that Compromising Confidentiality Will Make a Safer Environment for Children

According to the Request for Comment Memo, the rationale for automatic distribution of Family Court orders is: "to promote a safer environment for children through enhanced information sharing between child welfare and parole/probation systems." However, the Memo does not offer an explanation for how the amendment will promote a safer environment and no studies or other information is provided for the implied causative link between parent involvement with DOCCS or probation and threats to child welfare other than what a layperson may – often erroneously – assume. SSL § 384-b(1)(a)(iii) mandates that "the states' first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home;" and there is no assurance that DOCCS or a probation department will understand this vital role that child welfare agencies are meant to play under FCA Article 10.

The Request for Comment Memo indicates that DOCCS and probation departments currently have access to Family Court records only when preparing a pre-sentence investigation. To be accurate, Corrections has access to Family Court records from the NYS Office of Children and Family Services (OCFS) central registry in many different types of investigations at either the request of Family Court or as part of their responsibilities in preparing reports for other courts. The comprehensive list, detailed in SSL § 422(4)(k), includes access to central registry information when conducting an investigation at the request of the Family Court concerning juvenile delinquency or when a child-in-need-of-supervision action has been filed, when investigating habeas corpus matters and custody and visitation of children (which is a very broad authorization for this type of specific evaluation that could involve much more than the Central Registry records,) when investigating the background of a defendant for a pre-sentence report or otherwise supervising someone convicted of one of many felonies and misdemeanors listed under the Penal Law, Corrections has access to these records to give the courts a fair idea of all of the factors that may impact a custody, sentencing, or supervision decision when the court is burdened with ensuring that sentences or rehabilitation efforts should reflect an individual's circumstances.

Beyond the circumstances discussed above, courts have protected the confidentiality of Family Court records from anyone not listed in SSL § 422(4)(k). For example, a Westchester County court refused to order a child welfare agency to release records even when a father sought them in relation to a civil suit alleging negligence against a physician and nursing agency regarding their conduct before the death of his own child and the investigation that followed. *Bibbins v Sayegh*, 46 Misc. 3d 519 (Supreme Ct, Westchester Co 2014). The reason that the central registry records are available to Corrections in the circumstances of SSL § 422(4)(k) is clear and rationally related to the exceptions. The proposed change to 22 NYCRR § 205.5 would provide DOCCS and probation departments unlimited access to orders without any purpose aside from general "child safety." Absent articulable links between DOCCS and probation department access and measurable improvement in the safety of children whose parents are under DOCCS or probation supervision (discussed below), access should not be expanded as proposed.

III. The Risk of Misuse of Information is High and Will Likely Result in Criminalization of Non-Criminal Conduct

The responsibilities and goals of child welfare agencies and DOCCS and probation departments are very different. Child Welfare agencies are tasked with helping families and assisting them in ways that minimize separation between children and their parents. See SSL § 384-b(1)(a)(iii). Beyond that, Article 10 proceedings are civil in nature and contemplate that all efforts made by the court and child welfare agencies are to effectuate permanency for the children. In a worst case scenario, if an agency can prove a parent has failed to address conditions that led to state involvement, the Family Court is authorized to legally terminate the parent-child relationship. See SSL § 384-b et seq. But until that occurs, generally the child welfare agency must continue to make reasonable efforts to reunify the family. By contrast, DOCCS and probation departments are never tasked with preservation of families. The DOCCS mission statement is "[t]o improve public safety by providing a continuity of appropriate treatment services in safe and secure facilities where all inmates' needs are addressed and they are prepared for release, followed by supportive services for all

parolees under community supervision to facilitate a successful completion of their sentence." All aspects of supervision, be it probation or parole, relate to a conviction of an offense that has resulted in criminal penalties. And the consequences of failure to abide by conditions set by DOCCS and probation departments can be incarceration.

The Request for Comment Memo is silent about how DOCCS and probation departments will actually use the information contained in temporary and final court orders. But if DOCCS and probation departments start to take on supervision of Family Court requirements, this may result in additional conditions being added to probation conditions. See Criminal Procedure Law (CPL) § 410.20. Because Family Court orders contain directives from the judge about parent conduct, it would not be unimaginable that requests would be made to incorporate some of those requirements into probation conditions. This could lead to criminalizing conduct that is required in and only relevant to a civil matter. Any failure to adhere to the plan in Family Court proceedings could become a parole or probation violation. See CPL § 410.10(2).

One of the many possible problems presented by this overbroad proposal is that it does not differentiate between respondent parents and non-respondent parents. A non-respondent parent finds him/herself subject to the authority of the Family Court without any allegation of wrong-doing on his/her part. But because DOCCS or a probation department is given expanded access to Family Court records that is not based in any effort to maintain or reunify families, theoretically a non-respondent parent, subject to DOCCS or probation supervision, could be violated and incarcerated based on Family Court events that are not related to any conviction or efforts toward criminal rehabilitation, or even any allegations of improper acts or inactions.

The most concerning sentence in the Request for Comment Memo is, "It is believed that providing the New York State Department of Corrections and Community Supervision and local probation departments direct access to additional court records under this rule will beneficially inform decisions about continued supervision of the child." (Emphasis added.) Since DOCCS and probation departments are not supervising children, and only the child welfare agency is responsible for making decisions about the supervision of children, one is left to wonder how possession of orders by DOCCS and probation departments will assist the child welfare workers in promoting child safety. The effect of this change, instead of making environments safer for children, may actually be to delegate from the child welfare agency to DOCCS or probation some of the supervision of a parent's conduct and performance in relation to a Family Court matter. This may enable DOCCS or probation to use requirements that are detailed in Family Court orders against the adults they are supervising under the guise of "child safety" when the two matters may be entirely unrelated.

IV. Broader Access by DOCCS and Probation Departments to Family Court Records in the Future Presents Greater Concerns

As noted above, the Request for Comment Memo does not indicate that the DOCCS and probation department access to Family Court records will be limited to temporary and final orders in FCA article 10 and 10-A cases. Future expansion of access by these law enforcement agencies presents a number of concerns beyond those discussed above. For example, currently, under 22 NYCRR § 205.5, dissemination of information is strictly limited to the parties directly involved in the article 10 proceeding, prosecutors if a related criminal action is contemplated, or another Family Court. In fact, many of the documents that find their way into Family Court files, such as forensic reports, mental health records, and social service files, are protected, and to an even greater degree, by other confidentiality provisions. For example, the Third Department has held that social service records retain their higher level of confidentiality: "Family Court Act § 166 cannot be interpreted to override the specific dictates of Social Service Law § 422 ..." *Matter of Sarah FF.*, 18 AD3d 1072 (3rd Dept. 2005).

Finally, federal law requires that in order to be eligible for federal funding, states must include in planning

for activities to achieve the objectives 42 USCS § 5101 et seq. that they will maintain "methods to preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents ...." 42 USCS § 5106a(b)(2)(B)(viii). Any changes to New York law or court rules must take into account the potential impact that it will have on federal funding of child abuse or neglect prevention and treatment programs.

V. Conclusion

This proposal should be rejected.

This rule change does nothing to enhance the objective of the protection of the family as mandated by SSL § 384-b(1)(a)(iii). Instead, this change serves to confuse the relationships between a parent and his or her Family Court caseworker and probation or parole officer. Further, this change will muddle the goals and responsibilities of the child welfare agencies and DOCCS and probation departments and further confuse the objectives that are meant to assist the family. This de facto delegation of some of "supervision" to DOCCS and probation will complicate what is already a challenging situation for the parents and family and does nothing to ensure children are safer because of it.

If you have any questions regarding these comments, please do not hesitate to contact Lucy McCarthy, Staff Attorney, New York State Defenders Association, at 518-465-3524.

John W. McConnell

From: AFine@monroecounty.gov
Sent: Monday, December 5, 2016 10:05 PM
To: rulecomments
Subject: Public Comment on Proposed Amendment of 22 NYCRR sec.205.5

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver St., 11th floor
New York, NY 10004

Dear Mr. McConnell,

I am the bureau chief of the Family Court bureau of the Monroe County Public Defender's Office in Rochester, NY. My office represents respondents and non-respondent parents in Article 10 abuse and neglect cases, including permanency planning hearings and petitions to terminate parental rights. Please accept this public comment in opposition to the proposed amendment to 22 NYCRR sec. 205.5 to permit the department of corrections and community supervision or a local department of probation to have access to certain confidential Family Court records. My understanding is that this proposal was submitted to the Office of Court Administration by the Administration for Children's Services (ACS).

I have practiced as an attorney in Monroe County Family Court since 1995. I can not stress enough the high value placed on the confidentiality of family court records by all participants in family court proceedings, including judges, court staff, attorneys, and most importantly the litigants, most of whom are parents whose intimate family life with their children is the focus of the family court gaze. It is no small matter, particularly in Article 10 cases, to have one's private family life on display in a courtroom, subject to the scrutiny and judgment of strangers. It is precisely because Family Court deals exclusively with this most intimate area of human life--the relationship between parent and child and its impact on a child's wellbeing--that the privacy rule exists in the first place. The rule recognizes that the right of family privacy and integrity belongs exclusively to the parents and children. It does not belong to ACS or any other agency, and it is not theirs to waive on behalf of families whose lives are under the family court microscope. While under the current section 205.5, others may be permitted to breach this privacy barrier without court order, they may do so only insofar as they are prosecuting a charge in family court against a parent or child, or caring for the child, or representing a litigant who has a duty to care for the child, or representing the child directly.

From this perspective, the proposed expansion of access to family court records to agencies doing adult criminal parole and probation supervision is unprecedented. Never before has an agency with no involvment in litigating a child's custody or caring for a child been granted such routine records access. Even district attorneys must make a motion for family court records, and must make a showing that their request complies with the disclosure exceptions set forth in the rule. To approve the expansion contemplated in ACS's rule change on the strength of a vague assertion that it will somehow lead to "enhanced information sharing between child welfare and parole/probation systems," is to ignore one of the foundational principles of family court proceedings in the name of amorphous beauracratic communication. This alone should give the Office of Court Administration pause before adopting the proposed amendment.

On a practical level, the proposed amendment appears to fail as well. Where in New York law is there such a thing as "enhanced information sharing between child welfare and parole/probation systems"? Child protective agencies are subject to an elaborate array of statutes pertaining to the confidential nature of their work under Title 6 of the Social Services Law. That law does not authorize "information sharing" between a child protective agency and "parole/probation systems" outside the boundaries of the law. This proposed amendment to the Uniform Rules for the Family Court does not change that. Rather, it appears to be a "back door" attempt by a child protective agency to let other

agencies have access to documents generated as part of an Article 10 case, without having to comply with the strict confidentiality provisions of the Social Services Law. And even if a representative of a parole/probation system sought to gain access to certain family court records from the family court clerk's office, that person still would not be able to freely discuss the documents with child protective agency caseworkers. The proposed amendment to section 205.5 would appear to have no impact whatseover on "enhancing" communication between child protective agencies and parole/probation systems.

On the subject of parole or probation officers seeking access to family court records, I can not recall a single instance in my 16 years with the Public Defender's office of a parole or probation officer seeking copies of a parolee or probationer's family court records in an Article 10 case, even in cases where the crime at issue was based on the same set of facts at issue in the Article 10 case. Almost universally, it is the child protective agency that seeks information from the parole or probation agency, not the other way around. This is typcially and lawfully achieved by the caseworker asking the parent or person legally responsible to sign a release permitting the child welfare agency to speak to the parole or probation officer about the parent's parole or probation compliance. Likewise, if the parole or probation officer were really interested in gaining access to family court records, particularly temporary or permanent orders as contemplated by the proposed amendment to section 205.5, the officer could do that by simply asking the parent/person legally responsible to produce copies of the orders. In other words, there does not appear to have ever been any burning desire on the part of parole or probation departments to add monitoring of family court Article 10 orders to their already long lists of duties. Furthermore, if on a case by case basis they wished to do so, there are less intrusive means of achieving that purpose that do not involve overturning longstanding family court rules of confidentiality and privacy.

Finally, the proposed rule change is worded as if it assumes that the only person ever identified in an Article 10 temporary or permanent order is the parolee or probationer. In my experience, this assumption is incorrect. Children's names and birthdates are often included in orders, as are the identities of relatives or other persons with whom the children are placed or who are authorized by the court to act as visitation supervisors. The non-respondent parent's name is often identified in orders, as that person must be named to comply with Article 10 notice requirements, or the non-respondent parent may also be subject to the family court's supervision. At times, particularly with temporary orders or permanency planning orders, the co-respondent is also identified in the order and provisions pertaining to that person may also be set forth in the same order. All of these persons, particularly the other parents and children, are afforded the right of privacy and confidentiality of family court proceedings. Yet the proposed rule appears to operate as if this reality does not exist. And it does so even as it grants parole and probation officers broad authority to redisclose the orders "as necessary for [the parolee/probationer's] supervision." But by what authority does a parole or probation agency have the power to gain access to, let only redisclose, confidential information relating to persons not under their supervision, and without the knowledge or consent of those persons? It would appear that this problem is another reason to reject the proposed rule amendment proposed by ACS.

For all these reasons, I urge the Office of Court Administration to reject the proposed amendment to 22 NYCRR 205.5, and I thank you and the OCA for the opportunity to comment on the proposal.

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January 20, 2017

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Dear Mr. McConnell:

The Administration for Children's Services (ACS) urges that the Administrative Board of the Courts adopt the proposed amendment to 22 NYCRR §205.5 to permit the department of correction and community supervision or a local department of probation have limited access to temporary and final orders relating a person under their supervision who is responsible for the care of a child who is the subject of a proceeding under article ten or ten-a.

ACS feels strongly that we be able to share with the department of correction and community supervision or local department of probation information about a person under their supervision who is responsible for the care of a child who is a subject of an article ten or ten-a proceeding. Currently ACS in limited in the information that can be shared with the department of correction and community supervision and local departments of probation. This rule change would allow ACS to alert corrections or probation to the fact that the person under their supervision is the caretaker of a child under the jurisdiction of the Family Court so that corrections or probation can notify ACS if the person under supervision is arrested and thus unable to care for his/her child or the officer in charge of the supervision obtains other information that may indicate that the child is at risk of abuse or neglect.

For example, in a recent case, a young boy was removed from the care of his mother and released to the custody of his father, who was not a respondent of the Family Court article 10 case. The father was on probation and supervised by . The officer supervising him was not aware that he had a young child in his care or that the child was under the jurisdiction of the Family Court and under the supervision of ACS. Thus [probation/parole?] did not notify ACS that the child's father was arrested and was no longer the caretaker of the child. Better information sharing with the department of corrections and community supervision may have impacted decisions about continuing supervision or requesting a change in disposition.

In addition to the above scenario, corrections and community supervision and probation officers may also obtain information that directly relates to the safety of child in the custody of the person under supervision. Without knowledge of ACS involvement, corrections or probation would not know to share the information. The amendment would improve communication between the agencies and encourage a more holistic approach to the supervision of parents and children who are involved in both the child welfare and parole/probations systems.