

## 9.4: PART III- FAMILY LAW

### ADOPTION

Adoption is the legal process whereby a parent or parents take a non-birth child as their own. Both Family Court and Surrogate Court have jurisdiction over adoptions. All adoptions in NYS must be judicially sanctioned by a judge in either Family Court or Surrogate Court. Note that Surrogate Court judges are also called Surrogates and are defined as such in DOM § 109(3).

An adopted child acquires all the same legal rights, obligations, and duties of a biological child.

After an adoption, a new birth certificate is issued that reflects the child's new surname if it is actually being changed, and names the adopting parents as the parents of that child. The child's original birth certificate, as well as the entire adoption file, is then sealed, and is to be opened only by a court order upon a showing of good cause.

### TYPES OF ADOPTIONS :

**Agency Adoption:** This is when the placement of a child for adoption is made through a NYS agency that is licensed and authorized by law to receive and place children for adoption within NYS.

**Private Placement Adoption:** Any adoption, other than through an agency, is a private placement adoption. In these situations, the biological parents of the child choose who will adopt their child.

**Step-parent Adoption:** This is when a single parent with a child or children gets married, and the new spouse (step-parent) adopts the child or children. This is still considered a private placement adoption.

**International Adoption:** Many couples adopt children from other countries. The rules and regulations of the various countries that allow international adoptions vary greatly. If a child is adopted in another country, the parents can readopt the child in NYS, which provides a court order recognizing the foreign adoption in NYS.

### WHO MAY ADOPT?

In New York State just about any adult who is 18 years of age or older can adopt. (See DOM § 110) This includes:

- an unmarried person,
  - a married couple,
  - two unmarried intimate partners,
  - a married person who is legally separated from his or her spouse, or
  - a married person who has been living apart from his or her spouse for at least three years before the adoption case is filed.
- (DOM § 110)

The standard for adoption is what is in the best interest of the child, just as it is for child custody. An adult with a felony conviction may not be able to get approval to adopt.

### NYS ADOPTION CONSENTS AND NOTICE REQUIREMENTS

In agency adoptions, the agency consents to the adoption of the child in its care and guardianship. In private placement adoptions, the private individuals must give their consent. This consent can be given in front of a judge. This is called a judicial consent. If the consent is given, but not in front of a judge, this is called an extra-judicial consent.

The consent to an adoption given in writing in court in front of a judge is immediately irrevocable. The biological parent(s) cannot change their mind and have their child returned. However, if the consent is not given in front of a judge, the parents have 45 days to change their mind and withdraw their consent. If this happens, this does not mean the child will automatically be returned to the biological parents. If the adoptive parents oppose the withdrawal of the consent, then a hearing will be required. The judge will then determine if the consent was properly withdrawn in time and if so, then decide the custody of the child based on what is in the best interest of the child.

#### Required Consents:

Domestic Relations Law § 111 states:

“1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

- (a) Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;
- (b) Of the parents or surviving parent, whether adult or infant, of a child conceived or born in wedlock;
- (c) Of the mother, whether adult or infant, of a child born out of wedlock;
- (d) Of the father, whether adult or infant, of a child born out-of-wedlock and placed with the adoptive parents more than six months after birth, but only if such father shall have maintained substantial and continuous or repeated contact with the child..."

Under certain circumstances, consent is not required of a parent who does not have contact with their child for six months or more after birth. Domestic Relations Law § 111 states:

"2. The consent shall not be required of a parent or of any other person having custody of the child:

- (a) who evinces an intent to forego his or her parental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so;"

## GENERAL INFORMATION ABOUT NEW YORK STATE ADOPTIONS

- Court adoption records in NYS are sealed. No one can see the court records of an adoption including the public, the adoptive parents, the birth parents, or the adopted child.
- Children cannot be sold or bought for adoption (or for any other purpose). It is a crime to do so. If suspected, the parties will be subject to criminal investigation and prosecution in New York.
- Parents who participate in an international adoption may petition for a readoption in New York State. When an adoption is completed in a foreign country, a Petition for Registration of Foreign Adoption Order can be filed in either the Family Court or Surrogate's Court in the county of residence. By doing so, the adoptive parents can obtain a New York court order that recognizes the foreign adoption. This will allow the parents to get a New York birth certificate for their adoptive child from the Department of Health. Sometimes, a readoption case may be necessary to satisfy federal immigration requirements.
- Surrogate parent agreements are not legally binding in New York. Surrogate motherhood is against public policy in NYS. (DOM § 122.) A surrogate mother that is paid for carrying a child for another person may be subject to a civil fine. (DOM § 123(2)(a)) New York courts will not force a surrogate birth mother to give up her child to another person, even if she agreed to do so by written contract.
- Pursuant to the Interstate Compact on the Placement of Children (ICPC), adopting parents must get approval before a child from another state is brought into New York State for adoption. Requests for such are processed through the NYS Office of Children and Family Services' ICPC Unit.
- New York State has an Adoption Information Registry. This Registry can help an adopted person get medical information or general information about their birth parents or, in some cases, siblings. However, no information that can identify either the adoptee or birth parents is given without the appropriate legal permission of the parties involved. The Registry is under the jurisdiction of NYS' Department of Health. For more information regarding this Registry, use the following link.
- [https://www.health.ny.gov/vital\\_records/adoption.htm?PHPSESSID=55729bfebab7670d004fde3ce3fa0a12](https://www.health.ny.gov/vital_records/adoption.htm?PHPSESSID=55729bfebab7670d004fde3ce3fa0a12)
- A NYS adoption must be initiated, and eventually "finalized", in a Family or Surrogate Court in the county in which the adoptive parents reside.
- The adoption process is initiated by the filing with the court of a petition to adopt.
- Adoptive parents seeking to adopt through private placement are required to obtain certification by the appropriate court, as qualified adoptive parents, prior to taking custody of an adoptive child. Part of this process includes criminal background checks and a home study.
- The final order of adoption will not be signed by the court until at least six months after the initiation of the adoption proceeding, unless the court determines that signing the order sooner is in the child's best interest.

## PATERNITY

Paternity is defined as the state or condition of being a father. Paternity suits are family court proceedings where the court will determine who is the legal father of a child. In some circumstances, this may not be the biological father. The typical paternity suit occurs when a mother is seeking child support for a child born out of wedlock. Before a court can order a person, who is not

married to the mother of a child to pay child support, that person must either admit they are the father of said child or if they do not, family court must determine he is the father. The following are some common legal terms used in paternity cases.

**Order of Filiation:** An order establishing the paternity of a child or unborn child born out of wedlock issued by a court.

**Putative Father:** Person assumed to be the father of a child born out of wedlock, by actions or deeds such as parenting, providing physical and/or monetary support.

- **Presumed Father:** The man to whom the mother was married to at the time of the birth of the child.
- **Adjudicated Father:** Non-marital father whose paternity has been established by court order.
- **Putative Father Registry:** Out of Wedlock data bank with NYS Dept. of Social Services for:
  - Men adjudicated as fathers
  - Men acknowledged to be fathers
  - Men claiming to be fathers who have filed
- **Acknowledgment of Paternity:** This is a written instrument whereby a person admits that he is the biological father of a child born out of wedlock.
- **Birth Certificate with the Father Named:** Having the father's name on the Birth Certificate does not constitute proof of paternity.

Family court exclusively uses DNA testing to establish paternity. DNA testing establishes a 95% or higher probability of paternity. The standard of proof in paternity suits is clear and convincing evidence. This is a higher standard than the preponderance of the evidence but lower than beyond a reasonable doubt. Respondents have the right to remain silent during paternity suits but unlike criminal cases, that silence can be used by family court against the respondent.

If the court determines that a person is the father of a child, the court will issue an order of filiation. The effects of an order of filiation are that the support obligations of the adjudicated father are the same as those born in wedlock. Support will be retroactive to the date of the filing of the paternity petition. The court has discretion to order payments for money spent on the child before filing including expenses of the pregnancy.

It is presumed that a child born in wedlock is the child of the husband. This is a rebuttable presumption. A husband that suspects he is not the father of a child that his wife gives birth to can institute a paternity suit to determine whether he is the biological father.

**Equitable Estoppel:** There is a common law doctrine that states that the delay in bringing a court case will preclude a person from asserting their rights against another person who has justifiably relied on the conduct and who would suffer damage if the person were now allowed to assert such rights. This is known as equitable estoppel. NYS has codified this doctrine to apply to paternity suits. (Family Ct Act § 418 [a]; § 532 [a]) The following case illustrates how the doctrine is applied to paternity suits.

[Matter of Shondel J. v Mark D.](#)

[7 NY3d 320 \( 2006\)](#)

[Court of Appeals](#)

[OPINION OF THE COURT](#)

(Dissenting Opinion and Footnotes Not Included)

Rosenblatt, J.

In this child support proceeding, we hold that a man who has mistakenly represented himself as a child's father may be estopped from denying paternity, and made to pay child support, when the child justifiably relied on the man's representation of paternity, to the child's detriment. We reach this conclusion based on the best interests of the child as set forth by the Legislature.

#### I.

In January 1996, Shondel J. gave birth to a daughter in Guyana, where she then resided, and in a birth registration document named Mark D. as the father. Shondel and Mark had dated the previous spring in Guyana and had sexual intercourse.

Although Mark was in New York when the child was born, he provided financial support for the child and returned to Guyana later in the year to see her. In a sworn statement, notarized by the Guyana Consul-General in New York in January 1996, Mark declared that he was "convinced" that he was the child's father and accepted "all paternal responsibilities including child support." In 1998

he signed a Guyana registry, stating that he was her father and authorizing the change of her last name to his. Mark named the child the primary beneficiary on his life insurance policy, identifying her as his daughter. He also sent Shondel money monthly for the child's support from her birth until June 1999 and then less regularly through the summer of 2000.

In August 2000, Shondel commenced a Family Court Act article 5 proceeding alleging that Mark is the father and seeking orders of filiation and support. Initially, Mark did not contest paternity. On the contrary, in September 2000, when the child was 4½ years old, Mark commenced a Family Court Act article 6 proceeding, seeking visitation. In his petition, he stated that he was the child's father, and that he loved her and wished to "spend quality time with her on a regularly scheduled basis."

In October 2000, however, when appearing before a Family Court hearing examiner to answer Shondel's petition, Mark requested DNA testing. The hearing examiner ordered genetic marker tests, which revealed that Mark is not the child's biological father. The hearing examiner then dismissed Shondel's paternity petition, and Mark abandoned his petition for visitation, having severed his relationship with the child. Shondel objected to the hearing examiner's order, expressing doubts about the laboratory tests and stating that she would be able to show that Mark had always recognized the child as his. Realizing that the hearing examiner had exceeded her authority in dismissing Shondel's petition, Family Court sustained her objection and appointed a law guardian for the child.

In October 2001, the Law Guardian reported that Mark had acted as the father of the child, who in turn considered him her father. Family Court set the matter down for a trial on equitable estoppel and ordered another set of tests. A blood genetic marker test confirmed that Mark is not the child's biological father.

At the estoppel trial, Family Court heard widely diverging testimony from Shondel and Mark. According to Shondel's testimony, Mark spent time with her and the child when they traveled to the United States in 1996 and 1997, seeing them "every day" for about six weeks in the summer of 1997 in New York; continued to visit the child and take her out after his relationship with Shondel soured in 1998; bought the child toys, clothes and other gifts; took the child to meet his parents; told his family that she was his daughter; regularly spoke with the child by telephone; referred to himself as "daddy" when talking with the child; and visited the child "almost every other day" in August 1999 and "almost every other day" between the time Shondel and the child moved to New York in January 2000 and the commencement of this litigation.

Mark denied all of this, asserting that he had seen the child only four times since her birth; that he had not acknowledged the child as his; that he had not introduced the child to his family or friends as his child; that he had not sent the child birthday or Christmas gifts; and that he had never visited her. Mark testified that he twice asked Shondel to submit to a blood test to determine whether he was the father of her child. Shondel insisted that he did not.

Family Court believed Shondel "entirely" and found Mark's testimony incredible. It ruled that Mark "held himself out as [the] child's father and behaved in every way as if he was the father, albeit a father who didn't reside for a good part of the child's life, in the same country." These affirmed findings of Family Court have support in the record and are binding on this Court.

Family Court entered an order of filiation and awarded child support retroactive to the date Shondel commenced the Family Court proceeding. The Appellate Division affirmed, concluding that "Family Court properly determined that it was in the best interests of the subject child to equitably estop [Mark] from denying paternity" (6 AD3d 437 [2004]). We agree, based on our precedents, the affirmed findings of fact and the legislative recognition of paternity by estoppel.

## II.

The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position (see generally *Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982]).

New York courts have long applied the doctrine of estoppel in paternity and support proceedings. Our reason has been and continues to be the best interests of the child (*Jean Maby H. v Joseph H.*, 246 AD2d 282, 285 [2d Dept 1998]; see generally *Matter of L. Pamela P. v Frank S.*, 59 NY2d 1, 5 [1983]).

Although it originated in case law, paternity by estoppel is now secured by statute in New York (see Family Ct Act § 418 [a]; § 532 [a]). For that reason, and contrary to Mark's assertions, it is not for us to decide whether the doctrine has a rightful place in New York law. Clearly it does, in the absence of legislative repeal or a determination of unconstitutionality. Mark argues for the first

time in this appeal that sections 418 (a) and 532 (a) are unconstitutional and deprive him of due process. As this claim was not raised in the courts below, we do not entertain it.

Equitable estoppel is gender neutral. In *Matter of Sharon GG. v Duane HH.* (63 NY2d 859 [1984], *affg* 95 AD2d 466 [3d Dept 1983]), we affirmed an order of the Appellate Division dismissing a paternity petition in which a mother sought to compel her husband to submit to a blood test as a means of challenging his paternity. We agreed with the Appellate Division that the mother should be estopped. As that Court pointed out, the mother expressed no question about her child's paternity until some 2½ years after the child's birth. She had held the child out as her husband's, accepted his support for the child while she and her husband lived together and after they separated, and permitted her husband and child to form strong ties together.

Estoppel may also preclude a man who claims to be a child's biological father from asserting his paternity when he acquiesced in the establishment of a strong parent-child bond between the child and another man. The rationale is that the child would be harmed by a determination that someone else is the biological father. For example, in *Purificati v Paricos* (154 AD2d 360 [2d Dept 1989]), a boy's biological father who did not seek to establish his paternity until more than three years after the child's birth, and who acquiesced as a relationship flourished between the boy and his mother's former husband, was estopped from claiming paternity. The courts "impose equitable estoppel to protect the status interests of a child in an already recognized and operative parent-child relationship" (*Matter of Baby Boy C.*, 84 NY2d 91, 102 n [1994]).

Finally, the Appellate Division has repeatedly concluded that a man who has held himself out to be the father of a child, so that a parent-child relationship developed between the two, may be estopped from denying paternity. Where a child justifiably relies on the representations of a man that he is her father with the result that she will be harmed by the man's denial of paternity, the man may be estopped from asserting that denial.

### III.

Mark represented that he was the father of the child, and she justifiably relied on this representation, changing her position by forming a bond with him, to her ultimate detriment. He is therefore estopped from denying paternity.

Mark expressly represented that he was the father of Shondel's child in the notarized sworn statement and in the Guyana registry in which he gave the child his name, as well as in the visitation petition filed with Family Court. Further, Mark held himself out as the child's father, and behaved in every way as if he was the father. Mark and the child had a close relationship, in which he referred to himself as her "daddy," and which involved regular telephone conversations, frequent visits when she and Mark were in the same city and contact with his parents. Moreover, Mark named the child as the primary beneficiary on his life insurance policy and sent money monthly for the child's support until June 1999, and then less regularly through the summer of 2000.

The record also establishes that the child justifiably relied on Mark's representations, accepting and treating him as her father. The Law Guardian's October 2001 oral report to Family Court on her interview with the child (conducted when she was 5½ years old) concluded that she

"considers Mark [D.] to be her father. She enjoys spending time with him, she knew his name, she described what he looks like, different things about his appearance, she talked about some of the things they did together, she enjoyed the visits a lot, he brought her presents in the past, he took her out without the mother sometimes, there's a picture album with pictures of [Mark] in it and she wanted me to express that she misses him and she wants to know when he's going to come back to see her."

In the best interests of the child, Family Court properly applied estoppel, to impose support obligations on Mark, after he left the child with the detrimental effects of a relationship in which she was misled into believing that he was her father. A mother who had perfect foresight and knew that her child's relationship with a father figure would be severed when the child was 4½ might well choose never to inform him of her child's birth.

### IV.

Mark attacks the statutory basis for the application of paternity by estoppel. In 1990, the Legislature amended Family Court Act § 418 (a), which governs the procedures related to scientific testing of biological paternity in support proceedings, so as to read, in pertinent part:

"The court, on its own motion or motion of any party, when paternity is contested, shall order the mother, the child and the alleged father to submit to one or more genetic marker or DNA marker tests . . . to aid in the determination of whether the alleged father is or is not the father of the child. No such test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of *res judicata*, equitable estoppel or the presumption of legitimacy of a child born to a married woman." (Family Ct Act § 418 [a] [emphasis supplied]; see L. 1990, ch. 818, § 12.)

Arguing that the statute is self-contradictory, Mark asserts that the law mandates scientific testing of biological paternity in support proceedings and then in the next sentence makes such tests discretionary. We view the statute differently.

By providing a limited “best interests of the child” exception to mandatory biological tests of disputed paternity, the statute requires Family Court to justify its refusal to order biological tests when paternity is in issue. Before the amendment, Family Court was authorized, but not required, to order biological tests, and the court did not have to justify its refusal to do so. Now, in a support proceeding in which paternity is disputed, Family Court must explain why it denies a motion for biological paternity testing. The court may deny testing based on “res judicata, equitable estoppel or the presumption of legitimacy of a child born to a married woman,” if denial is in the best interests of the child.

It is true that a child in a support proceeding has an interest in finding out the identity of her biological father. But in many instances a child also has an interest—no less powerful—in maintaining her relationship with the man who led her to believe that he is her father. The 1990 amendment to Family Court Act § 418 (a) appropriately balances these interests in accordance with the primary purpose of the Family Court Act—to protect and promote the best interests of children.

The procedure contemplated by section 418 (a) is that Family Court should consider paternity by estoppel before it decides whether to test for biological paternity. Here, the process was inverted early in the proceeding. Instead of referring the matter to a Family Court judge, the hearing examiner ordered genetic marker tests of paternity when the parties appeared in October 2000. As a result, the child’s biological paternity had been addressed before Family Court conducted its trial on the issue of estoppel. Nevertheless, even though the tests had been conducted, Family Court was authorized to decide the estoppel issue.

## V.

In allowing a court to declare paternity irrespective of biological fatherhood, the Legislature made a deliberate policy choice that speaks directly to the case before us. The potential damage to a child’s psyche caused by suddenly ending established parental support need only be stated to be appreciated. Cutting off that support, whether emotional or financial, may leave the child in a worse position than if that support had never been given. Situations vary, and the question whether extinguishing the relationship and its attendant obligations will disserve the child is one for Family Court based on the facts in each case. Here, Family Court found it to be in the best interests of the child that Mark be declared her father and the Appellate Division properly affirmed.

Asserting that the equities are with Mark, our dissenting colleagues argue that we do not acknowledge the fraud or misrepresentation exception to the doctrine of equitable estoppel. This argument is misplaced for three reasons. To begin with, the child is the party in whose favor estoppel is being applied and there can be no claim here that she was guilty of fraud or misrepresentation. Secondly, to the extent that it matters, we note that there is no evidence of fraud or willful misrepresentation even on Shondel’s part. It is not likely that she would have initiated paternity proceedings, with the predictable prospect of biological testing, if she expected tests to rule him out as the father. There is every reason to believe that she thought Mark was the biological father and that the tests would confirm her belief. Finally, the issue does not involve the equities between the two adults; the case turns exclusively on the best interests of the child.

We appreciate the dissenters’ concern over applying estoppel to a case in which, as between Mark and Shondel, it was she who misrepresented Mark to be the father (even though she may have earnestly believed he was). The dissenters’ position, however, appears not to recognize that fatherhood by estoppel does not contemplate a contest between two adults to see who is the more innocent. The child is entirely innocent and by statute the party whose interests are paramount.

To the child, Mark represented himself as her father. The Legislature did not create an exception for men who take on the role of fatherhood based on the mother’s misrepresentation. That would eviscerate the statute and, with it, the child’s best interests. Under the enactment, the mother’s motivation and honesty are irrelevant; the only issue for the court is how the interests of the child are best served.

Here, Family Court found, and the Appellate Division affirmed, that Mark represented himself to be the father and that the child’s best interests would be served by a declaration of fatherhood. Under our decisional law, and contrary to the dissenters’ suggestion, equitable estoppel does not require that Mark, to be estopped, necessarily knew that his representation was false. A party who, like Mark, does not realize that his representation was factually inaccurate may yet be estopped from denying that representation when someone else—here the child—justifiably relied on it to her detriment (*see Romano v Metropolitan Life Ins. Co.*, 271 NY 288, 293-294 [1936]; *Triple Cities Constr. Co. v Maryland Cas. Co.*, 4 NY2d 443, 448 [1958]).

The dissenters cite *Simcusi v Saeli* (44 NY2d 442 [1978]), which holds that a defendant may be estopped to plead the statute of limitations after having wrongfully induced the plaintiff to refrain from filing a timely suit. *Simcusi* prevents defendants from



profiting from their misconduct. It does not bear on estoppel as between a man and the child with whom he has formed a father-daughter relationship.

Our dissenting colleagues point out that Mark has renounced fatherhood and now has no relationship with the child. This state of affairs, however, does not preclude the application of estoppel. If it did, a man could defeat the statute simply by severing all ties with the child.

Given the statute recognizing paternity by estoppel, a man who harbors doubts about his biological paternity of a child has a choice to make. He may either put the doubts aside and initiate a parental relationship with the child, or insist on a scientific test of paternity *before* initiating a parental relationship. A possible result of the first option is paternity by estoppel; the other course creates the risk of damage to the relationship with the woman. It is not an easy choice, but at times, the law intersects with the province of personal relationships and some strain is inevitable. This should not be allowed to distract the Family Court from its principal purpose in paternity and support proceedings—to serve the best interests of the child.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

Chief Judge Kaye and Judges Ciparick, Graffeo and Read concur with Judge Rosenblatt; Judge G.B. Smith dissents in a separate opinion in which Judge R.S. Smith concurs.

### Artificial Insemination

A child born to a married woman by artificial insemination is legitimate if:

- Insemination was performed by a person authorized to practice medicine
- There is written consent of woman and husband
- The doctor certifies she/he rendered the service
- However, NYS case law is not clear and definitive regarding artificial insemination rights and responsibilities.

### ORDERS OF PROTECTION

Court procedure for NYS family offenses is found in the Family Court Act (FCT) § 812. Family Court and criminal courts have concurrent jurisdiction. Victims may proceed in either or both courts.

Family court's objective is to stop the violence, protect the victims and offer rehabilitation services to the parties. Criminal court's objective is to stop the violence, protect the victims and punish the offender.

Victims must be related to the perpetrator by consanguinity or affinity, or as a former spouse or have a child with the perpetrator for standing to bring action. The statute also applies to persons in an intimate relationship. An intimate relationship is one that is deeper than an ordinary friendship and not necessarily sexual.

To obtain an Order of Protection from Family Court, the victim will submit a Petition and appear before a family court judge. The judge then issues a Summons or a Warrant for the offender to appear. The judge may also issue a Temporary Order of Protection at that time. After service or arrest, a fact-finding hearing is held by the judge. This is akin to a trial. The standard of proof for this fact-finding hearing is preponderance of the evidence. After the fact-finding a dispositional hearing is held but often rolled into fact-finding hearing. A dispositional hearing is akin the sentencing portion of a criminal trial.

The duration of a Family Court Order of Protection is a maximum of 2 years unless the court finds Aggravating Circumstances. Aggravating Circumstances can extend the order to 5 years.

The definition of Aggravating Circumstances can be found in FCT § 827 (vii).

...For the purposes of this section aggravating circumstances shall mean physical injury or serious physical injury to the petitioner caused by the respondent, the use of a dangerous instrument against the petitioner by the respondent, a history of repeated violations of prior orders of protection by the respondent, prior convictions for crimes against the petitioner by the respondent or the exposure of any family or household member to physical injury by the respondent and like incidents, behaviors and occurrences which to the court constitute an immediate and ongoing danger to the petitioner, or any member of the petitioner's family or household.

There is a statewide Order of Protection Registry. It was created by the Domestic Violence Intervention Act of 1994. It is attached to the New York State Police Information Network. It contains orders of protection issued by criminal, matrimonial and Family Court cases. All orders of protection must be issued on official uniform forms and filed with this registry.

Under New York State Criminal Procedure Law Section 140.10(4)(b), police officers shall arrest the enjoined party for violating a duly served Order of Protection involving a family or household member whenever they have reasonable cause to believe that the enjoined party:

- Violated a “stay-away” provision of the Order of Protection, or
- Committed a family offense in violation of such Order of Protection.

## PINS (Person In Need of Supervision)

A person in need of supervision (PINS) is an individual under the age of 18 who:

- Does not attend school
- Behaves in a way that is incorrigible, ungovernable, or habitually disobedient
- Is beyond the control of a parent, guardian or lawful authority
- Is suspected of drug abuse
- And requires supervision or treatment

Parents, guardians, schools and government agencies are usually the petitioners in PINS cases. After a Petition for PINS is filed with Family Court, there will usually be a meeting between the petitioner which is typically the parents or guardian and the child with the probation department. This is called the adjustment process. The purpose is to resolve the case without court intervention.

If this is not possible, there will be an initial court appearance where the child, now officially the respondent is accompanied by a parent or guardian, is informed of his or her rights, which includes the right to an attorney. The court can appoint an Attorney for the Child and if necessary a guardian ad litem to represent the respondent. It is rare in PINS cases that a child is remanded to a detention facility pending a fact-finding hearing.

At the fact-finding hearing, the judge will decide whether the child is “incorrigible, ungovernable, or habitually disobedient”, to such a degree that the child is out of the control of a parent or guardian, or is abusing drugs.

If the child is found to be a person in need of supervision, the judge may order any of the following:

- Discharge or release of the respondent with a warning
- Adjournment in contemplation of dismissal (ACD)
- Suspension of judgment for up to 1 year
- Placement of the respondent in his or her own home, in the custody of a suitable relative, or in a group or a foster home for up to 18 months
- Probation for up to 1 year
- The respondent, if over the age 10, to make restitution through community service or other means
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## JUVENILE JUSTICE

In 2017, New York passed the Raise the Age law that changes the law in regards to juveniles who commit crimes significantly because by October 2019, New York will no longer automatically prosecute 16- and 17-year-olds as adults.

The following is New York State’s official summary of the law as found at the following link: <http://raisetheagency.com/get-the-facts>

### KEY COMPONENTS OF THE LEGISLATION

The presumptive age of juvenile accountability is raised for 16 year olds effective 10/1/18 and for 17 year olds effective 10/1/19. Except as otherwise noted, all components described below are pursuant to this timeline.

The law will change cases for 16-17 year olds in the following ways:

#### Parental Notification

- Parents must be notified when their children are arrested.
- Questioning of youth must take place in age-appropriate settings, with parental involvement (including with regards to waiving Miranda rights), and for developmentally appropriate lengths of time.



## Court Processing

The vast majority of cases of 16-17-year olds will ultimately be heard in the Family Court, either originating there or being transferred there from the new Youth Part of the adult criminal court.

### Misdemeanors:

- All misdemeanor cases (other than vehicle and traffic law misdemeanors) will be heard in Family Court pursuant to the Family Court Act. This includes Family Court Act procedures for adjustment and confidential records.

### Felonies:

- All felony cases will start in the Youth Part of the adult criminal court.
- All non-violent felonies will be transferred from the Youth Part to the Family Court unless the District Attorney (DA) files a motion within 30 days showing “extraordinary circumstances” as to why the case should remain in the Youth Part. If DA files motion, there can be a hearing and the Judge must decide within 5 days of the hearing or motions whether to prevent the transfer of the case to Family Court.
- Violent felonies can also be transferred from the Youth Part to the Family Court. If the charges do NOT include the accused displaying a deadly weapon in furtherance of the offense, causing significant physical injury, or engaging in unlawful sexual conduct, the case will transfer to Family Court unless the DA files a motion within 30 days showing “extraordinary circumstances” as to why the case should remain in the Youth Part. If the charge does include an element listed above, removal to Family Court is only possible with consent of the DA. Vehicle and Traffic Law cases and Class A felonies other than Class A drug offenses cannot be transferred.
- 16 and 17-year olds whose cases remain in the Youth Part will be referred to as “Adolescent Offenders.” Adult sentencing will apply, but the Judge must take the youth’s age into account when sentencing. Adolescent Offenders are eligible for Youthful Offender treatment, as is the current law with respect to 16 and 17-year olds charged as adults.
- Adolescent offenders may voluntarily participate in services while their case is pending.

### Violations:

- Violations will be heard in adult criminal/local courts, as is the current law.

### Family Court:

- Youth whose cases are heard in the Family Court will be processed pursuant to existing Juvenile Delinquency (JD) laws, which includes the opportunity for adjustment. They will not have a permanent criminal record.

### Youth Part of Adult Court:

- New “Youth Parts” will be created. All 13-15-year-old Juvenile Offenders and all 16-17-year Adolescent Offenders will have their cases in the Youth Part.
- Family Court judges will preside over cases in the Youth Parts.

### Facilities

- No 16 or 17-year-old will be sentenced to or detained in a facility with adults. To the extent practicable, no youth under 18 will be held at Rikers by 4/1/18 and as of 10/1/18, a full prohibition against youth under the age of 18 being held at Rikers will be in effect.
- Youth whose cases are heard in Family Court will be detained or placed in OCFS-operated, OCFS-licensed, or ACS facilities (including Close to Home), as Juvenile Delinquents currently are.
- Adolescent Offenders who are detained pre-trial will be held in a specialized secure juvenile detention center for older youth, which will be certified and regulated by OCFS in conjunction with the state commission of correction. Judges have the discretion to order that Adolescent Offenders who are sentenced to less than a year serve such sentences in a specialized juvenile detention center for older youth.
- Adolescent Offenders who are sentenced to state imprisonment will be placed in an Adolescent Offender facility developed by the state with enhanced security managed by DOCCS with the assistance of OCFS.

### Sealing

- Anyone convicted of an eligible offense in an adult court may seek to have his/her record sealed pursuant to C.P.L. § 160.59 after ten years from the imposition of the sentence or discharge from incarceration, whichever is latest. Violent felonies, sex

offenses, and Class A felonies are not eligible offenses. In addition, sealing is only available for people who have no more than 2 convictions, one of which may be for a felony.

- The court will create a standardized form for a person to use to apply for sealing. There will be no fee for applying.

### Raise the Age Implementation Task Force

- The Governor will appoint members of a Task Force to coordinate the implementation of these changes.
- The Task Force will issue a report on planning and implementation one year after the effective date (April 2018) and after an initial year of implementation (by August 2019).

### Effective Dates

- Sealing Provisions: People may begin to apply for sealing 180 days after enactment (10/6/17).
- Raise the age for 16-year olds: 10/1/18.
- Raise the age for 17-year olds: 10/1/19.
- Sections related to state reimbursement to the counties for probation are effective 4/1/18.
- Sections related to reimbursement for detention and alternative to detention are effective 10/1/18.
- Elimination of state support for detained PINS will start 1/1/2020.

### Youthful Offenders

- The Youthful Offender (YO) laws remain the same.

### Juvenile Justice Categories:

In NYS, children that commit crimes are put into different categories depending on their age and the severity of the alleged criminal act. Children under the age of 7 cannot be charged with a crime. The following are the three categories:

1. Juvenile Delinquents: Is a child between ages 7 and 15 who has committed a criminal offense. All juvenile delinquency cases are heard in Family Court
2. Juvenile Offenders: A child, who is 13, 14 or 15 years old and has committed a very serious felony, may be tried as an adult in a criminal court. If found guilty, the child is called a juvenile offender, and is subject to more serious penalties than a juvenile delinquent.
3. Youthful Offenders: A 16, 17, or 18-year-old who commits a crime is treated as an adult, but can be considered for youthful offender status at the sentencing. Being a youthful offender gives a child a chance to have no criminal record even after a felony conviction.

Generally, to be treated as a youthful offender, the child must:

- Be least 16 and under 19 at the time the crime is committed.
- Have no prior felony convictions
- Have never been treated as a youthful offender before

Children accused of felonies or other serious violent offenses may not be given youthful offender status. It is up to the judge. A youthful offender record is not a criminal record and is automatically sealed. A youthful offender does not have to report their conviction on any applications for college or work. It also does not disqualify the youthful offender from holding public office, or public jobs. The maximum sentence of incarceration for a youthful offender can be no more than four years.

The U.S. Supreme Court case *InRe Gault* 387 U.S. 1 (1967) held that children who are accused of committing crimes in family court proceedings are entitled to the same basic constitutional protections afforded adult criminals, namely that they be notified of the charges against them, that they have the right of counsel, that they are entitled to remain silent, and that they can confront and cross-examine witnesses against them. The only right they are not entitled to is a jury trial.

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