New York State Bar Association
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Memorandum in Support

COMMITTEE ON CHILDREN AND THE LAW

Children #7-A May 13, 2016

A. 7879 By: M. of A. Gantt
S. 7605 By: Senator Bonacic
Assembly Committee: Judiciary
Senate Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the family court act, in relation to use of restraints on children appearing before the family court.

LAW AND SECTIONS REFERRED TO: Adds Family Court Act § 162-a

THE COMMITTEE ON CHILDREN AND THE LAW SUPPORTS THIS LEGISLATION

The proposed amendment provides that restraints are prohibited and thus must presumptively be removed upon entry of the juvenile into the courtroom unless the Family Court determines and explains on the record why restraints are "necessary to prevent:

(1) physical injury to the child or another person by the child;
(2) physically disruptive courtroom behavior by the child, as evidenced by a recent history of behavior that presented a substantial risk of physical harm to the child or another person, where such behavior indicates a substantial likelihood of current physically disruptive courtroom behavior by the child; or
(3) flight from the courtroom by the child, as evidenced by a recent history of absconding from the court."

The particular restraints permitted must be the "least restrictive available alternative" and, in order to ensure due process, the child must be given an opportunity to be heard regarding a request to impose restraints.

Since 2005, the United States Supreme Court has held that there must be restrictions upon the use of mechanical restraints on alleged adult offenders in criminal court. See *Deck v. Missouri*, 544 U.S. 622, 626 (2005). In 2012, the New York State Court of Appeals in *People v. Best*, 19 N.Y.3d 739 (2012) criticized the shackling of a defendant in a bench trial without the showing of the need for shackling on the record, noting that "judges are human, and the sight of a defendant in restraints may unconsciously influence

even a judicial factfinder," in addition to harming the defendant and the public's perception of both the defendant "and of criminal proceedings generally."

With respect to the shackling of children in court, the concerns that are raised regarding the use of restraints for adults are magnified. The sight of a child entering the courtroom in shackles and/or restraints colors the proceeding in a negative and confrontational light and diminishes the effectiveness of the court's ability to act in the best interests of a child. In addition, the effect of shackling upon the child, who is developing his or her sense of self and identity, is to create a permanent and indelible mark upon that child that they are a convicted criminal.

It is a challenge for all attorneys who represent children to develop an effective attorney-client relationship. In the courtroom, surrounded by other adults, attorneys and court personnel, it is already very difficult to engage a child client in the court process and to receive feedback essential to advocating effectively. Having a child client walk into courtroom with shackles and remain shackled throughout the proceeding, renders it nearly impossible to have the child client focus on the proceedings. Under physical restraints, a child client clearly does not feel part of the process, certainly does not feel that his or her voice is important, and leaves the proceeding unengaged in the process that is so vital to his or her life.

The NYSBA and the Committee on Children and the Law have supported and applauded New York's movement to include children's participation in Permanency Hearings. In these proceedings where a youth is over the age of 16 and has a criminal case, they are often brought into court with shackles and expected to be a full participant in their Permanency Hearing. Clearly, this is not a situation where it can be expected a youth will feel comfortable and engaged to have an effective voice in the outcome of their Permanency Hearing while wearing chains.

As was noted in the 2016 Report of the Family Court Advisory and Rules Committee to the Chief Administrative Judge of the Courts of the State of New York:

> A rapidly escalating national consensus is emerging to restrict the routine use of hardware restraints upon children when they appear in court. Two major national organizations – the National Council of Juvenile and Family Court Judges and the American Bar Association – adopted resolutions in 2015 calling for states to enact presumptions against the use of restraints, reserving their use only for cases in which the child poses a demonstrated safety risk to himself or herself or others. Recognizing the particular vulnerability of children, at least 21states have imposed a presumption against restraints either by statute, court rule or case law; fourteen states have statutes requiring an individualized judicial finding prior to use of restraints and ten of these afford youth a right to be heard. As the Florida Supreme Court stated, in promulgating its amendment to section 8.100 of the Florida Rules of Juvenile Procedure in 2009, routine shackling of children is "repugnant, degrading, humiliating, and contrary to the stated purpose of the juvenile justice system."

The 2016 Report of the Family Court Advisory and Rules Committee to the Chief Administrative Judge of the Courts of the State of New York further noted:

> The measure closely mirrors the presumption, exception factors and right to be heard in the Florida court rule, as well as the Model Statute/Court Rule developed by the Campaign Against Indiscriminate Juvenile Shackling, the statute and court rule in Pennsylvania, and the statutes in New Hampshire, North Carolina and South Carolina. It is similar to the court rules in Massachusetts, Washington, New Mexico and, most recently, Maryland. It is consistent with the orders that resulted from challenges to restraints in California, North Dakota, Oregon and Illinois. It reflects the criticisms articulated in, and recommendations by myriad commentators and, most recently, in the resolutions by the National Council of Juvenile and Family Court Judges and the American Bar Association.

The proposed amendment does allow for the use of restraints in rare circumstances when necessary to prevent injury or flight. However, it does so under very specific circumstances and sets forth a standard for the uniform and fair application of this procedure throughout the state.

The Committee of Children and the Law supports the position of the Family Court Advisory and Rules Committee on this issue and fully supports the enactment of Family Court Act §162-a, which prohibits the use of restraints on juveniles in Family Court unless the Family Court determines and explains on the record the need for such restraints to prevent injury, disruption in the courtroom, or flight.

Based on the forgoing, the New York State Bar Association's Committee on Children and the Law **SUPPORTS** this legislation.

Betsy Ruslander, Chair
Committee on Children and the Law

Kathleen DeCataldo, Chair
Legislative Response Subcommittee