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Moving from Criminal to Family Court

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OUTSIDE COUNSEL

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Moving from Criminal to Family Court

A CRIMINAL defense lawyer, who ordinarily represents adults, but is faced with defending a juvenile in Family Court, must know the different terms and procedures once Family Court's threshold is crossed.

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Family Court is a quasi-criminal institution that strives for rehabilitation. The Family Court Act's (FCA) language reflects those two major components. For instance, the term "defendant" is not used; juveniles accused of crime are "respondents." FCA §301.2(2).[1] In Family Court, the prosecutor (Corporation Counsel in New York City or the county district attorney for designated felonies) is the presentment agency or simply "petitioner," not the state. §§301.2(12), 254, 254-a. Cases are titled "In the Matter of" respondent, not the adversarial "People v." defendant. §311.1(6).

Judges are the sole finders of fact and arbiters of law in Family Court; there are no juries. §§340.2.[2] Accusatory instruments are "petitions." Family Court judges render "findings," not verdicts. §141. Juveniles enter "admissions," not "guilty pleas."[3] §321.1. Juveniles are not "jailed" but held in "detention." §301.2(3). Juveniles are found "responsible" or "not responsible," rather than "guilty" or "not guilty," after fact-finding hearings — not trials. §301.2(6).

Those found responsible may be "placed," not incarcerated, at a facility designated for youths and are adjudicated juvenile delinquents, not criminals. §§304.1, 380.1. Family Court judges determine appropriate action

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at a dispositional hearing, not a sentencing proceeding. §301.2(7).

The FCA is the controlling law absent reference to other statutes. The Criminal Procedure Law (CPL) applies when "specifically prescribed" by the FCA. §303.1. Specific prescriptions include statutory defenses, venue and double jeopardy.[4] §§303.3, 302.3, 303.2.

The FCA is more detailed than the CPL[5] and differs in crucial ways. A Family Court judge may interpret the CPL if doing so helps to apply similar FCA provisions. §303.1(2). If the CPL is amended after the referencing FCA provision, the CPL will be applied if the amendment was intended to apply in Family Court.[6]

Juvenile delinquents are children over 7 and under 16 who commit an act that would be a "crime" if they were adults and who are found in need of supervision, treatment or confinement. §301.2(1). Proceedings must begin before the child's 18th birthday. §302.2, CPL 30.10(2)(b). Children aged 13-15 who commit designated felonies may appear in Family Court or can be prosecuted as adults in Supreme Court. §301.2(8), Penal Law (PL) §30.00 (2). A youth convicted in Supreme Court is a "juvenile offender" sometimes subject under PL §70.05 to more severe penalties than a "juvenile delinquent" adjudicated in Family Court.

Detention Hearing

After an arrest, a juvenile may be released to a responsible adult. In that event, the juvenile receives an appearance ticket directing an appearance at a designated probation service within 72 hours if the allegation is a designated felony, 14 days if not. §307.1. A juvenile taken into custody must be brought to Family Court, before the petition is filed, for a detention hearing within 72 hours if charged with a designated felony or the next day court is in session, whichever is sooner. §307.4(5).

Family Court determines at a detention hearing whether it has jurisdiction over the juvenile in custody and whether continued detention is appropriate. §307.4. The FCA does not articulate the standard of proof required at detention hearings. §307.4. Often introducing the arrest report suffices. Other times the arresting officer must testify about the circumstances surrounding the arrest. The FCA provides that "[a]t such hearing the court must appoint a law guardian to represent the child . . . if independent legal representation is not available." §307.4(2). If the judge remands the juvenile, the presentment agency must be prepared for a probable-cause hearing within four days of the order. §307.4(7).

The presentment agency's filing of a written petition — the accusatory instrument — commences a delinquency case. After a petition is filed, the court issues it with a summons requiring a court appearance.

The initial appearance, which follows a detention hearing for a juvenile in custody, is "the proceeding on the date the respondent first appears before the court after a petition has been filed" and is akin to a Criminal Court arraignment. §320.1. If respondent is detained, the appearance is held within 72 hours after a petition is filed or the next day court is in session, whichever is sooner, and 10 days if the juvenile is at liberty. §320.2(1).

A law guardian is appointed if respondent is unrepresented. Respondent and the responsible adult are advised of the right to remain silent and to representation. §320.3. The court may release respondent with or without conditions. §320.5(1). If there is a substantial probability that respondent will not return to court or there is a serious risk that respondent will commit an act that would be a crime if committed by an adult, the court may direct detention after stating its reasons on the record. §320.5(3).[7] Unlike in adult court, bail is not an option.

An admission or denial must be entered to each charge in the petition at the initial appearance.[8] If the petition alleges one charge, an admission to a lesser-included charge is permitted if the court and presentment agency consent. §321.2(2). An admission to part of a petition that alleges more than one charge may be entered with the court's and presentment agency's consent if "such admission constitutes a complete disposition of these allegations in the petition which are determinable at the fact-finding hearing." §321.2(3).

A judge who accepts an admission must elicit allocutions from respondent and the responsible adult to ascertain that respondent (1) committed the act; (2) voluntarily waives a fact-finding hearing; and (3) knows the dispositional options. §321.3. The judge must also explain why the admission was accepted. §321.3(2).

The presentment agency must file a Voluntary Disclosure Form (VDF), with CPL §710.30 identification and statement notice, within 15 days of the initial appearance. §330.2(2). When a fact-finding hearing is scheduled sooner than 15 days from the initial appearance, a VDF with notice must be filed earlier. Counsel should file a motion to preclude statements or identification if the VDF is untimely. If respondent will assert an alibi defense, an alibi notice must be filed within 10 days of receiving an alibi demand. §335.2. An investigator and expert may be obtained pursuant to County Law Art. 18-B.[9]

The timing of motion practice depends on whether respondent is detained. Respondent must file discovery demands within seven days after the initial appearance if detained and 15 days if at liberty. §§331.7(1)(a), (2)(a). Petitioner must move for discovery within 14 days if respondent is detained and 30 days if not. §331.7(3). Other pre-trial motions must be filed within 30 days after the initial appearance. §332.2(1). Respondents may request *Mapp*, *Huntley* and *Wade* hearings. They may also seek dismissal for legal insufficiency if the verified petition and supporting depositions do not set forth sufficient evidence, if unexplained or uncontradicted, to warrant a finding.[10] The same review for sufficiency applies to Family Court petitions and Supreme Court grand jury indictments.[11]

Probable Cause

If respondent denies the petition's charges at the initial appearance and will be detained for more than three days for a fact-finding hearing, a probable-cause hearing must be held within three days of the initial appearance or four days of filing the petition, whichever is first. §325.1(2). The hearing may be adjourned for three court days for good cause. §325.1(3). Respondent may waive the hearing. §325.1. If the hearing is not held timely, the court may dismiss the petition without prejudice or adjourn for good cause and direct release. §325.3.

At the hearing, which is similar to a Criminal Court preliminary hearing, the presentment agency aims to convince the court that the juvenile committed at least one of the charges in the petition. The agency "must call and examine witnesses and offer evidence in support of the charge." §325.2(1). The court determines whether it is reasonable to believe that respondent committed a crime and states the applicable statutory provision. It also decides whether continued detention is necessary. §320.5. If reasonable cause is not found, the case is adjourned and respondent is released from detention. §325.3(4).

Respondent may call witnesses with the court's permission. §325.2(c). Only non-hearsay evidence, with exceptions for expert reports, is admissible. §325.2(3). Family Court must rule "in accordance with the evidentiary standards applicable to a hearing on a felony complaint in a criminal court." §§325.2(3), 325.3(1). A juvenile's testimony, if offered, may be used later only to impeach as inconsistent statements. §325.2(b).

Fact-Finding Hearing

A fact-finding hearing follows the detention hearing, initial appearance, probable-cause hearing, motion practice and suppression hearing. It resembles a Criminal Court bench trial. It must be held within 14 days of the initial appearance if respondent is detained and charged with a class A, B or C felony; or three days if charged with less than a C felony; or 60 days if respondent is not detained. §340.1.

If the fact-finding hearing is not held within the statutory three or 14 days, the court may release respondent and adjourn the hearing for a date within the statutory time frame for non-detained respondents.[12] Limited adjournments are granted for good cause and are excluded from speedy-trial calculations. §340.1(4)(a).

Speedy-trial rules in Family Court mirror Criminal Court's but require speedier resolutions. The clock runs from the initial appearance, even if the petition is amended or dismissed and a new one filed.[13] The clock is often tolled, such as during adjustment services and when respondent is subject to a bench warrant if due diligence is used to ascertain respondent's whereabouts. §340.1(7). Juveniles, like adults, enjoy a constitutional right to a speedy trial.[14]

Respondent and the law guardian are present at fact finding.[15] Each side may present an opening statement. §342.1(1). Petitioner presentment agency offers evidence to support the petition. §342.1(2). Respondent may offer evidence in defense. §342.1(3). "[T]he court may permit either party to offer evidence upon rebuttal which is not technically of a rebuttal nature." §342.1(4). Evidence at fact finding must be "competent, material and relevant" to establish the acts charged beyond a reasonable doubt. Each side may sum up. §342.1(6). Juveniles are entitled to due process under the seminal *In re Gault*[16] and *In re Winship*.[17]

The court enters a finding when the presentation concludes. If the allegations are sustained, the court enumerates the counts so found, including the Penal Law or other statutory provision under which the acts constitute a crime if an adult committed them, and schedules a dispositional hearing. §345.1.

The court must also state whether respondent committed a designated felony. If the court so finds, probation investigation and diagnostic assessment are ordered. If no designated felony is found, the court may order a diagnostic assessment. §351.1. The petition is dismissed if the allegations are not established beyond a reasonable doubt. §345.1(2).

Dispositional Hearing

The dispositional hearing commences within 10 days of the fact-finding hearing if respondent is detained and found to have committed a designated felony. §350.1(1). Otherwise, with some exceptions, the dispositional hearing must commence within 50 days of the fact-finding hearing. §350.1(2).

Although the dispositional hearing involves "sentencing" issues, including placement, probation and conditional discharge, it differs from Criminal Court sentencing. With the parties' consent, the court may direct probation to summarize its report and provide further statements. §350.4(1). The court, which takes an active role, may call witnesses, whom the presentment agency and respondent may cross-examine. §350.4. Petitioner and respondent may also call witnesses. §350.4(3),(4). As in the fact-finding hearing, the court may permit the parties to rebut or surrebut. §350.4(5).

Evidence at a dispositional hearing must be "material and relevant" to support the disposition to a preponderance. §350.3(1). The court must enter a dispositional order within 20 days. §§350.4(9), 352.1, 353.1.

If the court concludes that respondent requires supervision, treatment or placement, it adjudicates him or her a juvenile delinquent and orders a disposition. §352.2. The order may include a variety of outcomes but must state the reasons for the disposition. §352.2(3).

If the petitioner prevails at a fact-finding hearing, respondent, unlike an adult convicted of a crime, still has an opportunity to minimize the consequences of the delinquency proceeding. A Family Court judge must sentence a child to the least restrictive available alternative consistent with the child's needs, background, and best interests and the goal of protecting the community. §352.2(2)(a). If the court determines that no disposition is required, the petition will be dismissed even if already sustained. §352.1.

Probation may last up to two years regardless of the delinquency finding and can be extended for a year. §353.2(6). Probation and violations of probation can extend past age 16. Initial placements, not including extensions, can last up to 12 months for misdemeanors, 18 months for felonies, three years for designated felonies, and five years for class "A" felonies and second designated felonies. Placement can be with a relative or responsible adult, Administration for Children Services or private facility, state non-secure or limited secure facility, and restrictive facility for designated felonies. §353.3-5.

The Commissioner of Social Services or the Office of Children and Family Services (formerly the Division for Youth), to which respondent may be placed, may move to extend placement. §355.3. A petition to extend placement shall be filed at least 60 days before placement expires. A hearing on the need to continue placement is then conducted. A final extension for juveniles found to have committed designated, second designated or class A felonies can last an additional 12 months, until respondent's 21st birthday. §353.5.

The Family Court's flexibility to modify orders exceeds that of the Criminal Court. Orders may be modified, stayed, terminated or set aside if circumstances change substantially. §355.1. The court may order or respondent may request a new fact-finding or dispositional hearing or to stay execution of, set aside, modify, terminate or vacate an order. In determining the motion, the court "must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination." §355.2(4).

At disposition or earlier, without petitioner's consent, or on the law guardian's motion, the court may grant a six-month adjournment in contemplation of dismissal (ACD) for non-designated felonies. §§315.3, 330.2(2), 331.1(2). ACD conditions typically include curfews, community service, and counseling, and may be granted if the facts of the case, respondent's background and any post-arrest circumstances justify the disposition.

In Family Court, a case may also be "adjusted," a procedure not authorized for adults in New York State. Adjustment is the informal, consensual resolution of a case by probation.[18] Adjustment, sometimes offered in the preliminary stages but rarely at disposition, may occur if respondent's record is minimal and the act alleged is minor.

Removals

Defense attorneys often appear in Family Court when a case is removed from Criminal Court. In limited circumstances, a juvenile offender's Criminal Court designated-felony case may be removed to Family Court in the interests of justice. CPL 180.75, 210.43. When a preliminary hearing or grand jury action does not find a designated felony, the resulting order of removal to Family Court determines that probable cause exists that the child is a juvenile delinquent. No probable-cause hearing will be held, although the court must exercise de novo discretion as to release or detention. §325.1(5).

A plea or verdict, including one of not criminally responsible, that does not include a designated felony satisfies the requirements of a fact-finding hearing. §346.1. The date of filing the removal is deemed the date of an order entered after fact finding. 350.2(1).

Criminal lawyers who represent juveniles must learn Family Court's language and rules. Awareness of the numerous substantive and procedural differences between Family Court and Criminal Court provides the edge in effective representation.

(1) All references are to the Family Court Act, unless otherwise noted.

(2) *McKeiver v. Pennsylvania*, 403 US 528, 545 (1971).

(3) Unlike a criminal conviction, a juvenile adjudication does not forfeit rights. §380.1.

(4) The FCA provision governing statutes of limitations refers to the CPL but contains exceptions unique to Family Court. A juvenile delinquency proceeding must commence within 5 years of the act. §302.2.

(5) For example, FCA §331.1(2) defines "attorneys' work product" where the CPL is silent.

(6) *Matter of Luis M.*, 83 NY2d 226, 232 (1994).

(7) Fingerprinting is permitted only if the child is 11 or older and the crime is an A or B felony or if the child is 13 or older and the crime is a C, D or E felony. §306.1(1).

(8) Refusing to admit or deny causes the court to enter a denial to charges not admitted or denied. §321.1.

(9) See *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985).

(10) *Matter of Jahron S.*, 79 NY2d 632, 639 (1992).

(11) *Compare* FCA §§311.2(2) & 311.2(3) *with* CPL 70.10 & 190.60(1).

(12) *Matter of Bernard T.*, NYLJ, 2/16/99, at 26, col. 1.

(13) *Matter of Willie E.*, 88 NY2d 205, 206 (1996).

(14) *Matter of Benjamin L.*, NYLJ, 2/16/99, at 28, col. 1.

(15) Disruption permits ejection. §341.2.

(16) 387 US 1 (1967).

(17) 397 US 358 (1970).

(18) Merril Sobie, McKinney's Practice Commentary FCA §308.1, at 320.