

# FAMILY DEFENSE AND THE DISAPPEARING PROBLEM-SOLVING COURT

Jane M. Spinak†

INTRODUCTION . . . . .	171
I. FAMILY COURT AS PROBLEM-SOLVING COURT . . . . .	174
II. LIMITS OF PARENT REPRESENTATION IN FAMILY COURT . . . . .	178
III. CREATION OF FAMILY COURT TREATMENT PARTS . . . . .	185
IV. THE EFFECTIVENESS OF FAMILY COURT TREATMENT PARTS . . . . .	190
V. CREATION OF FAMILY DEFENSE PRACTICE IN NYC . . . . .	194
VI. IMPACT OF FAMILY DEFENSE ON FAMILY COURT TREATMENT PARTS . . . . .	196
VII. LESSONS . . . . .	200

## INTRODUCTION

The juvenile court was the original problem-solving court, where the role of the judge was to be a leader of a team that included other helping professionals, especially social workers and probation officers, to address the underlying reasons that the child was brought to court. The purpose was not so much to determine innocence or guilt but to help the child who had gotten into trouble through court-based interventions. While the Supreme Court in 1967 ultimately determined that children brought to court had due process rights that included the right to counsel, the role of the court as a place to solve problems remains a central tenet of this court system.<sup>1</sup>

As the juvenile court evolved into a family court where child maltreatment was adjudicated separately from delinquency, the core judge-driven and problem-solving model was applied to these subsequent proceedings. What was best for the child permeated the determinations of neglect or abuse even as the adjudication process became more structured and adversarial. Nevertheless, unlike the determination that children had a constitutional right to

---

† Edward Ross Aranow Clinical Professor of Law, Columbia Law School. Thanks especially to Michele Cortese, Kara Finck, and Emma Ketteringham for assisting me in this project. Thanks to Sarah Gledhill Deibler for her extraordinary research assistance. This article is dedicated to Sue Jacobs, the founding Executive Director of the Center for Family Representation.

<sup>1</sup> *In re Gault*, 387 US 1, 41 (1967); Jane M. Spinak, *Family Court*, in *THE CHILD: AN ENCYCLOPEDIA COMPANION* 344, 344-45 (Richard A. Shweder et al. eds., 2009).

counsel in delinquency matters, the Supreme Court has never held that parents have a concomitant right to counsel in child protective proceedings or even in termination of parental rights cases, perhaps the most drastic civil court outcome imaginable.<sup>2</sup> Without this constitutional mandate to provide counsel to indigent parents, states were not compelled to develop effective family defense legal practices and they did not. Even states, like New York, which statutorily require counsel for parents,<sup>3</sup> never embraced an institutional model of parental defense that mirrored either the institutional criminal defense or child advocacy systems that were developed and funded by state and county governments.<sup>4</sup>

Problem-solving courts began to flourish in the early 1990s with the creation of criminal drug courts as alternatives to standard criminal court practices.<sup>5</sup> In the drug courts, defendants would receive treatment rather than incarceration and be monitored closely within the court.<sup>6</sup> Family Court Treatment Parts (FCTPs) were developed in the late 1990s in New York State, fully embracing the three key components of the problem-solving drug court model: (1) an activist judge who helps to fashion, and then closely monitor, dispositions; (2) a team of lawyers, social workers, and court personnel who try to identify and then work toward common goals with the family; and (3) frequent and meaningful court appearances by relevant parties.<sup>7</sup> This team model has, at various times and in various FCTPs, challenged the attorneys for the parents (and sometimes the child) in fulfilling several of their ethical responsibilities to their clients, including preserving confidentiality, maintaining client-centered advocacy, and protecting due process rights.<sup>8</sup>

---

<sup>2</sup> *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31-32 (1981).

<sup>3</sup> N.Y. FAM. CT. ACT § 262 (McKinney 2012); *see also infra* text accompanying notes 33-35.

<sup>4</sup> For example, the Legal Aid Society of New York has been the primary institutional provider for criminal defense contracts with New York City since 1965. *See* Robert F. Wagner, Jr., Mayor, N.Y.C., Exec. Order No. 178 (1965). The Juvenile Rights Division (now Juvenile Rights Practice) of the Legal Aid Society was established in 1962—concurrently with New York Family Courts—and began contracts with New York State to represent children in child protective proceedings soon thereafter. *See* Merrill Sobie, Practice Commentary, N.Y. FAM. CT. ACT §§ 243, 245 (McKinney 2010); *see also* FAM. CT. ACT § 248.

<sup>5</sup> *See* Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1503 (2003).

<sup>6</sup> *Id.* at 1506.

<sup>7</sup> *See infra* Part III. I am using the term Family Court Treatment Part (FCTP). These parts are also called Family Treatment Court or similar types of names. For consistency, I will use only FCTP.

<sup>8</sup> *See infra* Part III.

In the last decade, New York City has embraced multi-disciplinary, institutional family defense practice by contracting with institutional providers to represent the vast majority of parents in child welfare proceedings.<sup>9</sup> The ability of these practitioners to improve the process and outcomes for families has begun to be proven and felt. Vigorous, sustained advocacy has challenged previous court practices that often failed to protect the procedural and substantive due process rights of parents and permitted often-unfettered judicial discretion. Social work staff employed by these family defense offices have proven just as adept at assisting parents in finding and sustaining treatment as staff employed by the FCTPs.<sup>10</sup> The development of this advocacy also challenges the problem-solving approach to resolving family concerns that characterizes the court in general but especially in the FCTPs that have incorporated a new generation of problem-solving court practices.

The rise of multi-disciplinary, institutional family defense practice has generated an unanticipated consequence: the diminishment and even disappearance of FCTPs in New York City. While the overall number of FCTPs has decreased in recent years across New York State for several reasons, including the lack of resources to sustain the courts, in New York City their disappearance can be attributed in significant part to the development of rigorous family defense practice where advocates counsel their clients about the meaning and impact of FCTPs in far more informed and nuanced ways and social work staff can effectively support parents addressing substance use.<sup>11</sup> This essay traces the trajectory of both the FCTPs and these practitioners to analyze this outcome. Part I introduces the Family Court as a problem-solving court and includes my concerns about the court as a place to solve problems. Part II discusses the limits of parent representation through a discussion of the Supreme Court decision in *Lassiter v. Department of Social Services* and subsequent litigation in challenging the effectiveness of the assigned counsel system in New York. Part III discusses the creation of FCTPs in New York and Part IV reviews what is currently known about the effectiveness of FCTPs. Part V traces the creation of family defense practice in New York City and Part VI discusses the impact that practice has had on FCTPs. Part VII discusses the lessons that can be learned from the creation of an effective system of parent representation.

---

<sup>9</sup> See *infra* Part V.

<sup>10</sup> See *infra* Part V.

<sup>11</sup> See *infra* Part VI.

## I. FAMILY COURT AS PROBLEM-SOLVING COURT

The founders of the juvenile court movement believed that the adversarial and punitive criminal court was unsuited to meet the needs of the young people coming into the court.<sup>12</sup> Rather, these reformers sought to address the underlying issues that the child faced: youthful antisocial behavior and family dysfunction. These issues were heightened—if not directly addressed—by poverty, immigration status, and racism. The adult criminal court was considered unable to distinguish the special developmental needs of children in order to treat them differently than adults.<sup>13</sup> The juvenile court, by contrast, would organize around these developmental and treatment needs, creating a rehabilitative ideal that was not rooted in the particular acts of the child or parent but focused instead on the potential outcome of appropriate practices on behalf of the youth.<sup>14</sup>

Judges of this early court saw themselves as the equivalent of doctors: not confined to the offense the youth committed, but more interested in the underlying causes in order to administer the right disposition.<sup>15</sup> As Judge Harvey Humphrey Baker, the first judge of the Boston juvenile court, noted:

In determining the disposition to be made of the case . . . [t]he judge and probation officer consider together, like a physician and his junior, whether the outbreak which resulted in the arrest of the child was largely accidental, or whether it is habitual or likely to be so; whether it is due chiefly to some inherent physical or moral defect of the child, or whether some feature of his environment is an important factor; and then they address themselves to the question of how permanently to prevent the recurrence.<sup>16</sup>

The medical metaphor still resonates. One of the most distinguished family court judges in recent years, Judge Leonard Edwards of California, described the family court similarly: “We are the legal equivalent to an emergency room in the medical profession. We intervene in crises and figure out the best response on a

---

<sup>12</sup> Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 259 (2008).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*; see also DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* (2004).

<sup>15</sup> Jane M. Spinak, *Judicial Leadership in Family Court: A Cautionary Tale*, 10 TENN. J.L. & POL’Y 47, 51-52 (2014) [hereinafter Spinak, *A Cautionary Tale*].

<sup>16</sup> Harvey Humphrey Baker, *Judge Baker on the Procedure of the Boston Juvenile Court*, in HARVEY HUMPHREY BAKER: UPBUILDER OF THE JUVENILE COURT 107, 114 (Judge Baker Found., 1921).

case-by-case, individualized basis.”<sup>17</sup> While not employing the medical metaphor directly, the rationale for the modern problem-solving court movement is strikingly similar. One of the foremost proponents of problem-solving courts, Greg Berman, describes “the authority of courts to address the underlying problems of individual litigants, the structural problems of the justice system, and the social problems of the communities.”<sup>18</sup> Berman is speaking of the broad range of problem-solving courts that his organization, The Center for Court Innovation, has helped to launch across the country in the last two decades, but he could easily be speaking about the family courts that emerged out of the original juvenile court throughout the twentieth century.<sup>19</sup> New York’s unified family court, for example, was created in 1962 as a problem-solving court to replace, in part, the Children’s Court, which was created as a problem-solving court at the beginning of the twentieth century.<sup>20</sup> The new unified family court—which would have original jurisdiction over child protective and delinquency matters as well as concurrent jurisdiction over issues of custody, support, and family offenses—was granted broad discretion to maintain the problem-solving approach:

[The Family Court Act] defines the conditions on which the family court may intervene in the life of a child, parent and spouse. Once these conditions are satisfied, the court is given a wide range of powers for dealing with the complexities of family life so that its action may fit the particular needs of those before it. The judges of the court are thus given a wide discretion and grave responsibilities.<sup>21</sup>

New York’s broad interventionist approach exists throughout most of the country and is reinforced by national organizations, like the National Council of Juvenile and Family Court Judges, which has

---

<sup>17</sup> Hon. Leonard P. Edwards, Superior Court of Cal., Cty. of Santa Clara, Remarks on Receiving the William H. Rehnquist Award for Judicial Excellence at the U.S. Supreme Court (Nov. 18, 2004), in *JUV. & FAM. CT. J.*, Winter 2005, at 45, 45.

<sup>18</sup> See Greg Berman, “What is a Traditional Judge Anyway?” *Problem Solving in the State Courts*, 84 *JUDICATURE* 78, 78 (2000); see also Jane M. Spinak, *Adding Value to Families: The Potential of Model Family Courts*, 2002 *Wis. L. REV.* 331, 362 (2002) [hereinafter Spinak, *Adding Value*].

<sup>19</sup> Berman, *supra* note 18, at 78; see generally ROBERT V. WOLF, *CTR. FOR CT. INNOVATION, BREAKING WITH TRADITION: INTRODUCING PROBLEM SOLVING IN CONVENTIONAL COURTS* (2007), <http://www.courtinnovation.org/sites/default/files/break%20with%20trad.pdf> [<https://perma.cc/Y27V-RHBE>] (discussing the emergence and purpose of problem-solving courts).

<sup>20</sup> See ALFRED J. KAHN, *A COURT FOR CHILDREN: A STUDY OF THE NEW YORK CITY CHILDREN’S COURT* 31 (1953) (describing the creation and re-creation of Children’s Court jurisdiction from 1902 until 1933).

<sup>21</sup> N.Y. FAM. CT. ACT § 141 (McKinney 1962).

championed the court as a place where a team of professionals led by the judge can provide a range of assistance and services for the families who find themselves in the court.<sup>22</sup> Most recent family court reform efforts reinforce this paradigm, whether the reformers are pursuing a unified family court, which consolidates all the issues facing a family before one judge so that the judge can address the family's needs holistically, or the reformers are creating specialized family court parts, like FCTPs, where the judge similarly helps to create and monitor solutions to the family's problems.<sup>23</sup> Either way, three assumptions exist: that the court is capable of intervening in a family's life not just to resolve the legal dispute that brought the family to court but to improve the family's life by addressing the complex social, emotional or psychological issues underlying the dispute; that court intervention will improve outcomes for families, and, most centrally, that the court is a good place to resolve family problems.<sup>24</sup>

As I have written elsewhere, I am deeply suspicious of an interventionist court whose primary purpose is to improve the lives of the children and families coming into the court.<sup>25</sup> This is for multiple reasons but can be summarized in this response to the unified family court movement:

A court is, at its core, an instrument of social control. What it does best is resolve disputed factual issues at a point when the litigants cannot resolve them by themselves. Courts gain control over these acrimonious situations only through the threat or reality of coercion. Thus, courts are generally seen as an option of

---

<sup>22</sup> See generally NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, THE MODEL COURT EFFECT: PROVEN STRATEGIES IN SYSTEMS' CHANGE 2 (2009), [http://www.ncjfcj.org/sites/default/files/Model%20Courts%20Brochure\\_Effect\\_2.pdf](http://www.ncjfcj.org/sites/default/files/Model%20Courts%20Brochure_Effect_2.pdf) [<https://perma.cc/LU4C-LWGP>].

<sup>23</sup> Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 527 (1998); see Spinak, *supra* note 12, at 261, 262-63, 269-71 (2008) (giving an explanation of "one family, one judge" and describing the various challenges facing problem-solving courts and the judges presiding over them).

<sup>24</sup> Spinak, *A Cautionary Tale*, *supra* note 15, at 78-79.

<sup>25</sup> See generally Spinak, *supra* note 12 (questioning whether the court is actually the best place to address significant social problems and its impact on criminal activity and family functioning); see also generally Spinak, *A Cautionary Tale*, *supra* note 15 (challenging the "therapeutic justice" approach in judicial leadership, which shifts the judge's role into a healer, and advocating for a return to a more neutral approach); Jane M. Spinak, *A Conversation About Problem-Solving Courts: Take 2*, 10 U. Md. L.J. RACE RELIG. GENDER & CLASS 113 (2010) [hereinafter Spinak, *Take 2*] (focusing on the potential disparate impact of problem-solving courts on minority families, and the difficulty supporters and critics involved in the problem-solving court movement have in talking and listening to each other).

last resort, somewhere for people to go to resolve serious disputes without resort to violence, and a place where society can assert its control over behavior that it considers too egregious to go unpunished. Most people who appear before a court do not wish to be there, and would have chosen another form of dispute resolution had it been possible.<sup>26</sup>

If courts are not recognized as instruments of coercion and control but as places to solve problems, there is a domino effect on families, particularly vulnerable families. Situating assistance and services with the court can diminish the funding and use of community-based services, where public health and harm-reduction types of solutions are more likely to exist and where earlier intervention can prevent a crisis.<sup>27</sup> Instead, more families may be brought into the court because that is where access to services is located. This has certainly been the experience in some FCTPs, where access to faster and better treatment is available.<sup>28</sup> These courts also reduce the responsibility the state has for creating the problems that result in child protection proceedings. Both the standard Family Court and the current problem-solving variations on that standard, such as FCTPs, place accountability on the individual parent rather than on the predominant causes of neglect and abuse: poverty and its ensuing hardships.<sup>29</sup> Professor Eric Miller has noted this accountability shift in considering drug courts generally: “[t]herapy and responsibility disaggregate the problem of drug crime from social and governmental forces. They take the emphasis off the increasing racial segregation and class stratification of the inner city, and emphasize the personal characteristics of the addict.”<sup>30</sup> These multiple underlying causes of family stress and the broader societal and structural failures to address them are marginalized when problem-solving courts shift the burden of resolution onto the individual parent.<sup>31</sup> Finally, due process protec-

---

<sup>26</sup> Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, 40 FAM. CT. REV. 435, 440-41 (2002).

<sup>27</sup> See generally Marsha Garrison, *Reforming Child Protection: A Public Health Perspective*, 12 VA. J. SOC. POL'Y & L. 590 (2005) (discussing cost efficiency of community-based preventative programs); see also generally Cynthia Godsoe, *Just Intervention: Differential Response in Child Protection*, 21 J. L. & POL'Y 73 (2012) (discussing effectiveness and value of community-based organizations in differential response programs).

<sup>28</sup> See *infra* Part III.

<sup>29</sup> Garrison, *supra* note 27, at 595-99, 612-16 (arguing for an empirically-based system of assistance to address the multiplicity of factors that produce child maltreatment and subsequent child welfare interventions, including foster care).

<sup>30</sup> Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 427 (2009).

<sup>31</sup> Garrison, *supra* note 27, at 595-99 (outlining the various ways in which social

tions are diminished in a problem-solving court where greater emphasis is placed on collaboration, supervision, and monitoring. Professor Wendy Bach has called this form of increased control hyperregulation:

[W]e link support to punishment, and we structure these systems in a way that is highly coercive and that disproportionately harms poor families led by African American women. When it comes to poor families in general and poor families of color in particular, we have a penchant for control and degradation. At the end of the day, judges are judges and therefore have at their disposal a fundamentally coercive toolbox. They order, and they punish parties for failing to comply with their orders. Exposing more and more poor families to these coercive settings and making participation in such settings the price of support invites more hyperregulation. To make matters worse, not only do problem-solving courts involve these considerable risks but tying such courts to abandoning rights leaves families even more vulnerable.<sup>32</sup>

If problem-solving courts are not the preferred solution for vulnerable families, the rights that they are holding onto have to be meaningful and productive. At base, this requires effective assistance of counsel, a right that remains elusive but, when provided, changes the very way we consider the options for vulnerable families.

## II. LIMITS OF PARENT REPRESENTATION IN FAMILY COURT

Family court has never cottoned to lawyers, particularly lawyers for parents. If the court is constructed around a judge who can determine what is best for children through a problem-solving approach and put that plan into effect, the need for procedural due process protections feels less urgent. When New York created the unified family court in 1962, no provision for the assignment of counsel for indigent parents in child maltreatment cases was included in the new Family Court Act (FCA).<sup>33</sup> Ten years later, the New York Court of Appeals determined that the loss of a child's

---

policies and law have failed to understand, prevent, or address child maltreatment). The more the burden for addressing child welfare is placed on the individual through the court-based problem-solving paradigm, the less likely that Garrison's recommendations will be considered.

<sup>32</sup> Wendy A. Bach, *Flourishing Rights*, 113 MICH. L. REV. 1061, 1073 (2015) (footnote omitted) (reviewing CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (2014)); see also Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113 (2011).

<sup>33</sup> Merrill Sobie, Practice Commentary, N.Y. FAM. CT. ACT § 262 (McKinney 2012).



society in a neglect proceeding “involves too fundamental an interest and right” not to be protected by the procedural due process right of assigned counsel.<sup>34</sup> The FCA was subsequently amended in 1975 to codify the right of indigent parents to be apprised of and assigned counsel in child maltreatment proceedings.<sup>35</sup>

Many states were far less committed to providing counsel for indigent parents and recognizing the fundamental right of family integrity involved in a court hearing that could result in children being removed from their parent’s care, either temporarily or permanently; many states provided no right to counsel and others only provided counsel on a case-by-case basis.<sup>36</sup> This led Abby Gail Lassiter to challenge the failure of Durham County, North Carolina, to provide her with counsel prior to terminating her parental rights.<sup>37</sup> Lassiter’s case reached the Supreme Court in 1981, where a divided Court determined that indigent parents were only entitled to counsel on a case-by-case basis, allowing the family court judge to resolve whether counsel was necessary to protect the parent’s right to fundamental fairness in the proceeding.<sup>38</sup>

Lassiter was a single parent whose youngest son, William, had been declared neglected and placed in foster care a year before Lassiter was imprisoned for second-degree murder.<sup>39</sup> Her four older children lived with Lassiter’s mother.<sup>40</sup> Three years later, Durham County Department of Social Services filed a termination of parental rights case to free William for adoption.<sup>41</sup> On the first day that Lassiter was produced from prison, the family court judge decided that she had received ample time to secure counsel despite being in prison and proceeded with the hearing.<sup>42</sup> Lassiter appeared *pro se* and, as Justice Blackmun recounts in his dissent, failed miserably as her own counsel:

An experienced attorney might have translated petitioner’s reaction and emotion into several substantive legal arguments.

---

<sup>34</sup> *In re Ella B.*, 30 N.Y.2d 352, 356 (1972).

<sup>35</sup> *Sobie*, *supra* note 33.

<sup>36</sup> See Erik J. Foley, *No Money, No Lawyer—No Children: The Right to Counsel for Indigent Defendants in Nevada Termination of Parental Rights Proceedings*, 16 Nev. L.J. 313, 321-22 (2015).

<sup>37</sup> See generally *In re Lassiter*, 259 S.E.2d 336 (N.C. Ct. App. 1979) (rejecting the claim by incarcerated mother that she had a due process right to representation by appointed counsel).

<sup>38</sup> *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981).

<sup>39</sup> *Id.* at 20.

<sup>40</sup> *Id.* at 23.

<sup>41</sup> *Id.* at 21.

<sup>42</sup> *Id.*

The State charged petitioner with failing to arrange a “constructive plan” for her child’s future or to demonstrate a “positive response” to the Department’s intervention. A defense would have been that petitioner had arranged for the child to be cared for properly by his grandmother, and evidence might have been adduced to demonstrate the adequacy of the grandmother’s care of the other children. . . . The Department’s own “diligence” in promoting the family’s integrity was never put in issue during the hearing, yet it is surely significant in light of petitioner’s incarceration and lack of access to her child. . . . Finally, the asserted willfulness of petitioner’s lack of concern could obviously have been attacked since she was physically unable to regain custody or perhaps even to receive meaningful visits during 21 of the 24 months preceding the action.<sup>43</sup>

Lassiter attempted to cross-examine the only witness for the state, a social worker who had visited her in prison once and who referred repeatedly to the agency record that was not entered in evidence.<sup>44</sup> Lassiter testified herself under questioning by the judge.<sup>45</sup> The judge and the county attorney questioned Lassiter’s mother but Lassiter was never told she could also question her mother.<sup>46</sup> The county attorney made a closing argument and when the judge asked if Lassiter had anything to say, she responded: “Yes. I don’t think it’s right.”<sup>47</sup> The judge determined that Lassiter had “‘wilfully failed to maintain concern or responsibility for the welfare of the minor,’ and because it was ‘in the best interests of the minor,’ the court terminated Ms. Lassiter’s status as William’s parent.”<sup>48</sup>

Justice Blackmun in his dissent notes the remarkable similarity between Justice Stewart’s *Mathews v. Eldridge* balancing test analysis for the Court and his own. Both find “the private interest [of the parent] weighty, the [case-by-case] procedure devised by the State fraught with risks of error, and the countervailing governmental interest insubstantial.”<sup>49</sup> Yet instead of reaching the same conclusion—that the *Mathews* test clearly supports providing counsel to indigent parents in every case—the Court found counsel was not

---

<sup>43</sup> *Id.* at 56 (Blackmun, J., dissenting) (citations omitted).

<sup>44</sup> *Lassiter*, 452 U.S. at 53-55.

<sup>45</sup> *Id.* at 54-55.

<sup>46</sup> *Id.* at 55.

<sup>47</sup> *Id.* at 56.

<sup>48</sup> *Id.* at 24 (majority opinion).

<sup>49</sup> *See id.* at 48-49 (Blackmun, J., dissenting) (describing the *Mathews* test, wherein the Court balances three distinct factors: the private interest affected; the risk of error under the procedure employed by the State; and the countervailing governmental interest in support of the challenged procedure).

an inherent due process right in termination of parental rights cases.<sup>50</sup> In dissent, Justice Blackmun found “virtually incredible the Court’s conclusion today that her termination proceeding was fundamentally fair. . . . [T]he Court simply ignores the defendant’s obvious inability to speak effectively for herself, a factor the Court has found to be highly significant in past cases.”<sup>51</sup> The majority was nevertheless troubled by its own determination that the case-by-case approach satisfies Constitutional due process requirements. In an awkwardly worded final sentence that embraces categorical representation instead, the opinion concludes: “The Court’s opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.”<sup>52</sup>

Despite the enlightenment exhibited by many states, there was concern that the Court’s imprimatur on case-by-case determinations would either encourage states to roll back their categorical approach to providing counsel or discourage states from abandoning the case-by-case approach. Legislatures or high courts mostly moved in the opposite direction. By 2015, forty-five states and the District of Columbia provided indigent parents with a categorical right to counsel in termination of parental rights proceedings.<sup>53</sup> Many states have also expanded the application of the right to counsel to other proceedings and stages of proceedings in the family court.<sup>54</sup> In one recent significant set-back, the New Hampshire Supreme Court held that the legislature’s decision to abolish the statutory right to counsel in every case as a cost-cutting mechanism did not violate the state or federal constitutions.<sup>55</sup>

Acknowledging the role of counsel in protecting the fundamental right of family integrity has not yet resulted in effective representation nationally.<sup>56</sup> Serious limitations exist on the actual

---

<sup>50</sup> *Lassiter*, 452 U.S. at 31-32 (majority opinion) (“[W]e [cannot] say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore adopt the standard found appropriate in *Gagnon v. Scarpelli*, and leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review.”).

<sup>51</sup> *Id.* at 57 (Blackmun, J., dissenting).

<sup>52</sup> *Id.* at 34 (majority opinion).

<sup>53</sup> Foley, *supra* note 36, at 322.

<sup>54</sup> *Id.* at 322-23.

<sup>55</sup> Martin Guggenheim & Susan Jacobs, *A New National Movement in Parent Representation*, 47 CLEARINGHOUSE REV. 44 (2013) (discussing the decision in *In re C.M.*, 48 A.3d 942 (N.H. 2012)).

<sup>56</sup> The substantive due process right of family integrity was most recently reaffirmed in *Troxel v. Granville*, where the Supreme Court concluded: “In light of this

provision and assistance of counsel for parents in child maltreatment and termination of parental rights proceedings across the country. Attorneys may not be appointed for all stages of the proceedings; they may be appointed after critical preliminary processes have begun; they may not be properly compensated.<sup>57</sup> An American Bar Association survey of parents' lawyers found that these attorneys may be paid as little as \$200 for an entire case.<sup>58</sup> These limitations have significant impact on attorneys embracing this difficult work. Michigan, for example, found that custodial parents were only represented at removal hearings 60% of the time and 50% of the time at non-removal preliminary hearings. In some counties, counsel is never appointed for preliminary hearings and parents may wait weeks for counsel after their children have already been removed.<sup>59</sup> Michigan has no standard state compensation rate so attorney compensation varies among counties, with few counties paying lawyers an hourly rate. Some counties pay by the hearing or stage of the case, even distinguishing payment by whether the client enters a plea or a hearing is conducted, regardless of the amount of work the lawyer must do to prepare.<sup>60</sup> The compensation is so low that these lawyers maintain caseloads in the hundreds, which severely limits their advocacy for any particular client. Lawyers rarely speak to their clients before court and, because of scheduling conflicts, substitute counsel is frequently required. And while Michigan is one of the few states that provides for a jury trial in child protection fact finding hearings, in 2005 jury verdicts occurred in 1% of the cases while parents pled to the allegations against them in close to 4000 cases.<sup>61</sup>

Michigan's experience was revealed because the state chose to study the issue.<sup>62</sup> In New York, the experience of assigned counsel

---

extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." 530 U.S. 57, 66 (2000).

<sup>57</sup> Leonard Edwards, *Representation of Parents and Children in Abuse and Neglect Cases: The Importance of Early Appointment*, JUV. & FAM. CT. J., Spring 2012, at 21, 23-25; Vivek S. Sankaran, *Protecting a Parent's Right to Counsel in Child Welfare Cases*, 28 A.B.A. CHILD L. PRAC. 97, 102-04 (2009).

<sup>58</sup> Guggenheim & Jacobs, *supra* note 55.

<sup>59</sup> Vivek Sankaran & Itzhak Lander, *Procedural Injustice: How the Practices and Procedures of the Child Welfare System Disempower Parents and Why It Matters*, MICH. CHILD WELFARE L.J., Fall 2007, at 11, 13-14.

<sup>60</sup> *Id.* at 14.

<sup>61</sup> *Id.*

<sup>62</sup> See *id.* at 14 n.27 (citing MUSKIE SCH. OF PUB. SERV. & AM. BAR ASS'N, MICHIGAN COURT IMPROVEMENT PROGRAM REASSESSMENT 134 (2005),

was the basis of a lawsuit in 2000—the *NYCLA* decision—to determine “whether New York State’s failure to increase the compensation rates for assigned counsel violates the constitutional and statutory right to meaningful and effective representation.”<sup>63</sup> At the time, counsel was paid \$40 per hour for in-court work and \$25 per hour for out-of-court work.<sup>64</sup> The court after a bench trial determined that the legislature’s failure “to increase the assigned counsel rates [results], in many cases, in denial of counsel, delay in the appointment of counsel, and less than meaningful and effective legal representation.”<sup>65</sup> In considering the impact on parent representation in family court in New York City, Judge Lucindo Suarez found there were insufficient numbers of assigned counsel in all five boroughs to be available to represent parents.<sup>66</sup> In New York County, for example, assigned counsel did not staff 40% of intake shifts.<sup>67</sup> Large numbers of family court matters, including child protective and foster care placement and review proceedings, never had counsel assigned.<sup>68</sup> Half of the assigned counsel submitted vouchers indicating that they had worked fewer than five out-of-court hours on their cases.<sup>69</sup> At the time of the trial, the assigned counsel administrator testified that she had 65 attorneys available in Bronx and New York Counties and needed 325 to staff the intake parts.<sup>70</sup> Because of the size of their caseloads and their inability to do their jobs, most assigned counsel had stopped accepting new cases.<sup>71</sup> The family court routinely proceeded with cases with no counsel present, causing Judge Suarez to determine irreparable harm to the litigants and unconscionable delay in court proceedings, resulting in children being removed from their homes and languishing in foster care, often without proper visitation orders, and more likely to be subject to termination of parental rights.<sup>72</sup>

---

sess.pdf [https://perma.cc/Z8XE-8QN2]); see also JASON A. OETJEN, NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, IMPROVING PARENTS’ REPRESENTATION IN DEPENDENCY CASES: A WASHINGTON STATE PILOT PROGRAM EVALUATION (2003), [http://www.opd.wa.gov/documents/0047-2003\\_PRP\\_Evaluation.pdf](http://www.opd.wa.gov/documents/0047-2003_PRP_Evaluation.pdf) [https://perma.cc/ZSZ4-MY6Y] (finding improved outcomes for families with enhanced parent representation).

<sup>63</sup> *N.Y. Cty. Lawyers’ Ass’n v. State*, 196 Misc.2d 761, 762 (N.Y. Sup. Ct. 2003).

<sup>64</sup> *Id.* at 764.

<sup>65</sup> *Id.* at 763.

<sup>66</sup> *Id.* at 764.

<sup>67</sup> *Id.* at 766.

<sup>68</sup> *Id.*

<sup>69</sup> *N.Y. Cty. Lawyers’ Ass’n*, 196 Misc.2d at 766.

<sup>70</sup> *Id.* at 767.

<sup>71</sup> *Id.* at 776.

<sup>72</sup> *Id.* at 772-73.

The court concluded beyond a reasonable doubt that the failure to raise the assigned counsel rate and to equalize the rate between in-court and out-of-court work was an unconstitutional violation of “the constitutional and statutory right to legal representation of children and indigent adults in New York City Family and Criminal Courts, and result in a constitutional imbalance among the branches of government impairing the judiciary’s ability to function.”<sup>73</sup> The court issued a mandatory injunction requiring assigned counsel to be paid \$90 per hour for all work until the legislature acted.<sup>74</sup>

While the impact of the *NYCLA* decision was eventually realized—encouraging more lawyers to join the assigned counsel panel and for many to provide effective assistance of counsel through meaningful out-of-court and in-court work—improving the rates and structure of the assigned counsel plan remained a limited solution for the thousands of litigants entitled to counsel yearly in family court.<sup>75</sup> As Judge Suarez found, effective assistance of counsel includes certain basic tasks in all cases, such as interviewing and counseling clients, conducting independent investigations and developing evidence, actively participating in every stage of the proceedings, and timely assignment to be able to work with clients from the very beginning of a case.<sup>76</sup> To do this well required a solution beyond fixing the assigned counsel plan, a turn instead toward a system of institutional representation that already existed for adult criminal defendants and children in family court delinquency and child maltreatment cases in New York City. But that turn did not come immediately. Instead, the court system focused first on creating “model court” parts that would improve the quality of child maltreatment proceedings, particularly where allegations of substance abuse was present.<sup>77</sup> The FCTPs that resulted considered counsel to be less central to securing fundamental fairness than having a problem-solving team approach.

---

<sup>73</sup> *Id.* at 778.

<sup>74</sup> *Id.*

<sup>75</sup> See generally N.Y. STATE BAR ASS’N, NYSBA TASK FORCE ON FAMILY COURT FINAL REPORT 43 (2013), <https://nysba.org/TFFCFinalReport/> [<https://perma.cc/FZ5C-GF2L>] (“Testimony presented to the Task Force described determinations of inability to afford counsel that were inconsistent from jurisdiction to jurisdiction and in some instances involved a broad use of discretion that did not appear to fulfill statutory intent.”); see also Sheri Bonstelle & Christine Schessler, Comment, *Adjourning Justice: New York State’s Failure to Support Assigned Counsel Violates the Rights of Families In Child Abuse And Neglect Proceedings*, 28 FORDHAM URB. L.J. 1151 (2001).

<sup>76</sup> See N.Y. Cty. Lawyers’ Ass’n, 196 Misc.2d at 778-82.

<sup>77</sup> See Spinak, *Adding Value*, *supra* note 18, at 350-55.

### III. CREATION OF FAMILY COURT TREATMENT PARTS

New York State created its first FCTP in 1997 and was designated a “model court” site under the auspices of the National Council of Juvenile and Family Court Judges Model Courts Project in 1998.<sup>78</sup> The same year, the first FCTP was launched in New York City.<sup>79</sup> Parents accused of neglecting their children because of substance abuse could participate in an extensive alternative court conferencing and monitoring system.<sup>80</sup> Eligible parents were assessed by the FCTP clinical staff, were required to waive their right to a litigated hearing, and had to admit that neglect was caused by their addiction.<sup>81</sup> The parent then entered into a negotiated treatment plan that had been created by the FCTP clinical staff, the parent and her counsel, the lawyer for the children, and the child protective agency’s attorney and caseworker; the plan was also approved by the presiding judge.<sup>82</sup> The parent was then referred immediately to treatment providers who contracted with the court to have available treatment spaces.<sup>83</sup> What ensued was an intensive

---

<sup>78</sup> NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, NEW YORK (2011), <http://www.ncjfcj.org/sites/default/files/NEW%20YORK%20STATE%20OUTREACH.pdf> [<https://perma.cc/6GLF-CQTD>]. “The National Council of Juvenile and Family Court Judges’ Permanency Planning for Children Department (NCJFCJ/PPCD) has created a web site that highlights the Child Victims Act Model Courts Project, which [was] funded by the U.S. Department of Justice’s Office of Juvenile Justice & Delinquency Prevention (OJJDP). . . . The model courts initiative is described by its funder, OJJDP, as ‘a nationwide effort to improve how courts handle child abuse and neglect cases, [that] is helping children spend less time in foster care and resulting in earlier resolution of cases in dependency courts.’ The model courts are part of the larger effort by the NCJFCJ/PPCD ‘to educate judges and other practitioners on the need to expedite secure safe permanent placements for all maltreated children, either by making it possible for them to safely stay with or return to their own families or by finding them safe adoptive homes.’ The model court description also includes other key elements seen as essential for success: interdisciplinary training and technical assistance for all youth-serving professionals using the NCJFCJ’s Resource Guidelines as a blueprint for improving court practice; identifying ‘lead’ judges to mobilize all the relevant players within their jurisdictions; developing programs that can be seen as easily replicable in other jurisdictions; piloting innovative alternative dispute resolution methods; and sharing information locally and nationwide through enhanced data systems.” Spinak, *Adding Value*, *supra* note 18, at 361-62 (footnotes omitted). The current version of the Project’s work is found at the NCJFCJ website. *See Model Courts*, NAT’L COUNCIL JUV. & FAM. CT. JUDGES, <http://www.ncjfcj.org/content/view/81/145/> (last visited Dec. 8, 2016).

<sup>79</sup> *See* Spinak, *Adding Value*, *supra* note 18, at 355.

<sup>80</sup> Robert Victor Wolf, *Fixing Families: The Story of the Manhattan Family Treatment Court*, 2 J. CTR. FAM. CHILD. & CTS. 5, 5, 15-16 (2000).

<sup>81</sup> *Id.* at 11-12.

<sup>82</sup> *Id.*

<sup>83</sup> *See* Gloria Sosa-Lintner, *Family Treatment Court*, in CHILD ABUSE, NEGLECT AND THE FOSTER CARE SYSTEM: EFFECTIVE SOCIAL WORK AND THE LEGAL SYSTEM; THE ATTORNEY’S ROLE AND RESPONSIBILITIES 609, 616 (David J. Lansner ed., 10th ed. 2000).

period of court supervision, with frequent in-court drug testing and appearances before the judge by the parent and other FCTP “team” members, including the lawyers and agency caseworkers.<sup>84</sup> Rewards for complying with the treatment plan could include longer periods of visitation and less supervision of the parent with her children.<sup>85</sup> Sanctions for positive drug tests or other lapses in plan compliance ranged from more frequent drug testing and court attendance to ultimate dismissal from the FCTP, sending the parent back to a regular child protective court part. Absconding from a residential program could be sanctioned by a warrant and jail time.<sup>86</sup>

During the first two years of the FCTP, thirty parents and guardians were reunited with seventy-two children whose average length of stay in foster care was eleven months. Approximately sixty-eight percent of the parent participants were in compliance with court mandates at the start of the FCTP’s third year.<sup>87</sup> In New York City, where children then spent an average of four years in foster care, these numbers were impressive.<sup>88</sup> These were families, however, for whom the most serious allegations of neglect or abuse had been screened out, and thus were more likely to have faster reunification.<sup>89</sup> Thirty families also have to be seen in perspective. In 1999, during the second year of the FCTP, over 12,000 original child protective and voluntary placement proceedings were filed in New York City.<sup>90</sup> And as the *NYCLA* litigation established, parents in the late 1990s were unlikely to receive effective assistance of counsel in those proceedings. The enhanced staffing and resources of the FCTP for a small number of carefully chosen families should have had the anticipated results.

By 2009, the practices of this FCTP had become standardized—as revealed by conversations with parent advocates at the time. The FCTP staff would identify potential FCTP parent partici-

---

<sup>84</sup> John Courtney et al., *Gentler Justice: Family Treatment Court*, CHILD WELFARE WATCH, Winter 1999, at 12, 12-13 (“As the details are worked out—and shaped into a contract that the parent must sign—the court makes referrals to one of about 35 recovery agencies and assigns other services. Parents must come back to the court every two weeks for at least a year to update the court on their activities and submit to drug testing.”).

<sup>85</sup> Wolf, *supra* note 80, at 15-16.

<sup>86</sup> Sosa-Lintner, *supra* note 83, at 628-29.

<sup>87</sup> See Wolf, *supra* note 80, at 19.

<sup>88</sup> David Fischer et al., *A Statistical Snapshot: The Scoppetta Years*, CHILD WELFARE WATCH, Winter 2001, at 12, 12; David Fischer et al., *Watching the Numbers*, CHILD WELFARE WATCH, Winter 2001, at 15, 15.

<sup>89</sup> See Wolf, *supra* note 80, at 10-11.

<sup>90</sup> Spinak, *Adding Value*, *supra* note 18, at 331.



pants from the cases being filed by the Administration for Children's Services (ACS). After a petition was filed, the FCTP coordinator would discuss with the parent the possibility of entering the FCTP *prior* to the parent speaking to her attorney. The coordinator would explain how the FCTP worked but did not discuss any of the parent's legal rights. If the parent thought she might want to participate, she would agree to an assessment and sign an assessment waiver, which indicated that information in the assessment would not be used against her in the future. Only then would she have the opportunity to speak to her lawyer and learn that among the conditions of participation, she would have to make an admission of neglect and waive her statutory right to a preliminary hearing on the removal of her child from her care. Family visiting procedures with her children were often inflexible, the FCTP staff approved only certain treatment and service programs, and alternative programs and assistance identified by the parent or her counsel were not considered. The case would be monitored in court every thirty days or so. At the point where a decision would be made about whether the goals of the treatment plan had been met and the case should be ended, a meeting would be held with the FCTP staff, the ACS attorney, and the judge. Parent's counsel was not invited to participate in this meeting.<sup>91</sup>

While FCTPs around the state developed a range of diverse practices—and the New York County FCTP is only one example—there were no established state standards or guidelines for the creation and implementation of FCTPs for more than a decade after the first FCTPs were instituted. Finally, sometime in 2010, the New York State Office of Court Administration (OCA) issued a compendium of “Effective Practices” for FCTPs, which included guiding principles and practices for the courts as well as some of the limited information gathered about the FCTPs experiences across New York State since their implementation.<sup>92</sup> An advisory committee to OCA had worked on these recommendations for about two years starting in 2007 but they were not published until long after the committee completed its work; the report remains difficult to

---

<sup>91</sup> Spinak, *Take 2*, *supra* note 25, at 128 (describing conversations with parent advocates at the time). The requirement of admitting neglect and the inability to conduct a post removal hearing remained in effect even though some of the other practices began to change about the time that article was published. That will be discussed more in the text accompanying notes 102-06, *infra*.

<sup>92</sup> See generally JUDY HARRIS KLUGER ET AL., ADVISORY COMM., NEW YORK STATE FAMILY TREATMENT COURTS: EFFECTIVE PRACTICES (2010), [https://www.nycourts.gov/courts/problem\\_solving/drugcourts/pdfs/EffectivePracticesFINALSept.2010.PDF](https://www.nycourts.gov/courts/problem_solving/drugcourts/pdfs/EffectivePracticesFINALSept.2010.PDF) [<https://perma.cc/5FC5-WDWW>] [hereinafter EFFECTIVE PRACTICES].

access.<sup>93</sup> This is especially unfortunate because the ultimate report, which was guided to completion by the founder of the first FCTP in New York State, Judge Nicolette Pach, was indeed a blueprint for creating and sustaining these courts in ways that recognized both their advantages and their challenges.<sup>94</sup> Several aspects are worth exploring in analyzing the overall approach of FCTPs in the context of the discussion of parents' counsel.

The report was thorough and responsive to the concerns of the participants involved in creating and implementing a FCTP. The guiding principles of the report strove to balance the substantive and procedural due process rights of adults and children brought to court in a child maltreatment case with the underlying structure of a court focused on the effective provision of treatment to maintain or reunify families through a non-adversarial approach. This was done in several ways. First, every professional participant—judge, attorneys, child protective workers, and specialized court personnel—were recognized as first being dedicated to their own professional obligations and only second to the team in which they were being asked to join.<sup>95</sup> This is particularly important for parents' lawyers who have a duty of loyalty to their client who is being subjected to this court process. In recognizing the importance of this loyalty to encourage client trust and communication, the report urges the other participants to understand how the parent's lawyer's "inviolable confidential relationship" to the client may at times conflict with the purpose of the court and the expectations of the other members of the court team.<sup>96</sup> This certainly played out in practice when lawyers representing clients participating in a FCTP would refuse to reveal confidential information that the client did not want revealed.<sup>97</sup> The report recom-

---

<sup>93</sup> I served on the Advisory Committee and closely followed the issuance of the document. I made a public call for the issuance of the Effective Practices materials in a forum on problem-solving courts and again in a published article as well as through correspondence with appropriate officials. See also *Drug Treatment Courts*, NYCOURTS.GOV, [https://www.nycourts.gov/courts/problem\\_solving/drugcourts/reports.shtml](https://www.nycourts.gov/courts/problem_solving/drugcourts/reports.shtml) [<https://perma.cc/483B-6T9H>] (last visited Oct. 18, 2016).

<sup>94</sup> The New York County FCTP, described earlier, was the second. SARAH PICARD-FRITSCHÉ ET AL., CTR. FOR COURT INNOVATION, THE BRONX FAMILY TREATMENT COURT 2005-2010: IMPACT ON FAMILY COURT OUTCOMES AND PARTICIPANT EXPERIENCES AND PERCEPTIONS 10 (2011), [http://www.courtinnovation.org/sites/default/files/documents/Full\\_Bronx\\_FTC.pdf](http://www.courtinnovation.org/sites/default/files/documents/Full_Bronx_FTC.pdf) [<https://perma.cc/X986-ZFGT>].

<sup>95</sup> EFFECTIVE PRACTICES, *supra* note 92, at 19.

<sup>96</sup> *Id.* at 105.

<sup>97</sup> Interview with Kara Finck, Practice Assoc. Professor of Law, Univ. of Pa. Law Sch. (Mar. 24, 2016) (notes on file with author). Professor Finck was the Managing Attorney for the Family Defense Practice at the Bronx Defenders from 2004-12.

mended that one way to achieve an understanding of divided loyalties is to engage parents' counsel (and all other relevant counsel, including the children's lawyers) in every aspect of the court's work, from the initial establishment to participation in all team and court meetings to reviewing and reorganizing court processes as needed.<sup>98</sup> In this way, parents' counsel is cognizant of every aspect of the court's workings and is able then to counsel her client fully on whether to choose to enter the FCTP, engage the client in a meaningful discussion about the advantages and disadvantages of submitting to FCTP jurisdiction, and discuss the likelihood of revealing otherwise confidential information. Several of the report's other principles offer parents' counsel additional reasons for recommending client participation: reminding FCTP team members and the judge that incentives and sanctions are intended to be consequences of parental actions and not punishments or rewards; that parent-child visiting should be driven solely by child safety and best interests and not as a sanction for program non-compliance;<sup>99</sup> that violations of court orders should rarely, if ever, result in incarceration and only after full compliance with due process mandates; that relapse is a component of recovery and needs to be considered in the context of everything else being achieved by the parent; and finally, that negotiated agreements for submitting to the court's jurisdiction should recognize a parent's right to contest removal of her children and the allegations of maltreatment and remain flexible beyond simply requiring a full admission to participate in a FCTP.<sup>100</sup> Even the report's extensive recommendations on data entry encourage analyzing the effectiveness of the FCTPs on achieving the court's primary goals of maintaining or reuniting children "with the recovering parent as long as the parent can sustain a safe, stable, and nurturing permanent home for her family."<sup>101</sup>

Perhaps if these *Effective Practices* had been created and utilized closer to the advent of FCTPs, attorneys for parents would have become full partners in developing the FCTP while also protecting their clients' rights.<sup>102</sup> When the New York County FCTP was first

---

<sup>98</sup> EFFECTIVE PRACTICES, *supra* note 92, at 86.

<sup>99</sup> *But see* PICARD-FRITSCHÉ ET AL., *supra* note 94, at 19 ("[C]ourt observations revealed that a common FTC sanction is to reduce visitation privileges that a respondent has with his or her children.").

<sup>100</sup> EFFECTIVE PRACTICES, *supra* note 92, at 18-19, 71-74, 113-14, 152. *But see* PICARD-FRITSCHÉ ET AL., *supra* note 94, at 19.

<sup>101</sup> EFFECTIVE PRACTICES, *supra* note 92, at 8, 11, 136; *see also id.* at 10, 44-45.

<sup>102</sup> Remarkably, even today, across the country most states have yet to create rules, guidelines, and practices for FCTPs. Only 16 states have some form of statewide stan-

created, neither potential treatment agencies nor the attorneys who would be appearing on behalf of parents and children were initially included in the planning. Only after the institutional provider of children's counsel in neglect and abuse proceedings convened a meeting of treatment providers and family court lawyers to discuss the FCTP, did the court system agree to include other stakeholders in any aspects of the planning.<sup>103</sup> At the time, parents were represented by assigned counsel and, as the *NYCLA* case established, were unable to participate meaningfully in either planning or attendance in the FCTP. Nevertheless, significant resources were put into the FCTP and, as described earlier, initially resulted in better treatment and reunification outcomes for the small number of parents who participated.<sup>104</sup> By 2009, resources and staff had been cut and the parent's due process rights were diminished: parents did not speak to counsel before being assessed by the FCTP coordinator, admissions to neglect were always required, and parent attorneys were not routinely included in team meetings.<sup>105</sup> The Center for Family Representation had been created to represent parents in New York County and was challenging some of these FCTP practices and counseling clients about their concerns.<sup>106</sup> A parallel experience was occurring in the Bronx, where the Bronx Defenders had also started a family court practice in 2004.<sup>107</sup> The creation of this family defense representation tracks the diminishment of FCTP in New York City. Before examining the impact of these offices on FCTPs, it is worth understanding what is known about the effectiveness of FCTPs and how that informs counseling a client to participate in a FCTP.

#### IV. THE EFFECTIVENESS OF FAMILY COURT TREATMENT PARTS

FCTPs have proliferated since the late 1990s, reaching over

---

dards. See *Problem-solving Courts*, NAT'L CTR. FOR ST. CTS., <http://www.ncsc.org/Services-and-Experts/Areas-of-expertise/Problem-solving-courts.aspx> [<https://perma.cc/7D9D-6MLP>] (last visited Oct. 18, 2016) (follow "View table" hyperlink under AN OVERVIEW OF STATEWIDE EFFORTS BY PROBLEM-SOLVING COURT TYPE).

<sup>103</sup> The meeting was convened by the Juvenile Rights Division of the Legal Aid Society. At the time I was the Attorney-in-Charge of the division.

<sup>104</sup> See Wolf, *supra* note 80.

<sup>105</sup> See Spinak, *Take 2*, *supra* note 25; see also Interview with Michele Cortese, Exec. Dir., Ctr. for Family Representation (Apr. 1, 2016) (notes on file with author).

<sup>106</sup> A change of judges also impacted CFR's ability to challenge some practices. For example, some presiding judges were more open to considering ACDs or to holding removal hearings in the FCTP as well as communicating about court procedures more regularly with parents' counsel. Email from Michele Cortese, Exec. Dir., Ctr. for Family Representation (Dec. 2, 2016, 11:45 EST) (on file with author).

<sup>107</sup> Interview with Kara Finck, *supra* note 97.

300 across the country in the last two decades.<sup>108</sup> In an era when government is clamoring for “evidence-based” services, the effectiveness of FCTPs remains unproven for multiple, intersecting reasons. The first, and most important, is that none of the FCTP studies so far have been randomized. The best quasi-experimental studies conducted to date have mostly (but not entirely) provided promising outcomes, but the variability of their designs and size, and their inability to account for which variables in the FCTP lead to the more positive outcomes for families, are significant limitations acknowledged by all of the researchers.<sup>109</sup> The studies have generally measured two aspects of FCTPs: substance abuse treatment for parents and child welfare outcomes. Since the central purpose of submitting to FCTP jurisdiction is to address substance use affecting parenting, the likelihood of entering treatment, the time to treatment, days spent in treatment, and the likelihood of completing at least one treatment were identified as indicative of FCTP effectiveness.<sup>110</sup> Successful treatment is intended to lead to better child welfare outcomes; these include the decreased likelihood of a child’s out-of-home placement, less time spent in out-of-home placement, less time needed to reach permanency (an outcome that prioritizes family reunification, a stable placement outside of foster care, or adoption), and family reunification.<sup>111</sup> With one significant exception discussed more fully below, on all of these measures (except time to permanency and with variation within the studies), participating in the FCTP had a positive impact. What none of the researchers have been able to answer is

---

<sup>108</sup> WEST HUDDLESTON & DOUGLAS B. MARLOWE, NAT’L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 19 (2011), <http://www.ndci.org/sites/default/files/nadcp/PCP%20Report%20FINAL.PDF> [<https://perma.cc/G84L-SVVE>].

<sup>109</sup> See, e.g., Eric J. Bruns et al., *Effects of a Multidisciplinary Family Treatment Drug Court on Child and Family Outcomes: Results of a Quasi-Experimental Study*, 17 CHILD MALTREATMENT 218, 226-29 (2012); Sonia D. Worcel et al., *Effects of Family Treatment Drug Courts on Substance Abuse and Child Welfare Outcomes*, 17 CHILD ABUSE REV. 427, 434-39 (2008); Beth Green et al., *How Effective Are Family Treatment Drug Courts? Outcomes From a Four-Site National Study*, 12 CHILD MALTREATMENT 43, 56-58 (2007). Other quasi-experimental studies have measured different or overlapping outcomes and are harder to use for comparison. See, e.g., PICARD-FRITSCHÉ ET AL., *supra* note 94; Suzanna Fay-Ramirez, *Therapeutic Jurisprudence in Practice: Changes in Family Treatment Court Norms Over Time*, 40 L. & SOC. INQUIRY 205 (2015).

<sup>110</sup> See Bruns et al., *supra* note 109, at 226; see also Green et al., *supra* note 109, at 55-56; Worcel et al., *supra* note 109, at 429.

<sup>111</sup> See Bruns et al., *supra* note 109, at 226-27; see also Green et al., *supra* note 109, at 56; Worcel et al., *supra* note 109, at 439-40.

why.<sup>112</sup>

The why matters. As the authors of the largest quasi-experimental outcome study acknowledged:

[A]nalysis should address whether the positive reunification outcome is due simply to the [FCTP] model's influence on treatment, or whether the [FCTP] model, in and of itself, uniquely contributes to family reunification. This type of analysis, combined with a more thorough investigation of the features of [FCTPs] that may lead to parental success, can begin to unpack the 'black box' of [FCTPs] by building an understanding of the most important operational characteristics of successful [FCTP] programmes.<sup>113</sup>

The FCTP's influence on treatment could occur in several ways. The FCTP may have faster and better access to treatment providers; the FCTP may contract with specific treatment providers otherwise unavailable to parents; the FCTP may monitor the treatment provider services to ensure that it is the appropriate treatment; and the FCTP may have additional resources to accomplish some or all of these functions. These advantages in securing treatment that parents in other court parts may not currently have available would not be sufficient justification for creating and staffing a special court part if rationalizing these approaches and resources across all child protective cases involving substance abuse treatment could accomplish the same treatment goals. Instead, do FCTPs offer something beyond increased likelihood of successful treatment that may also be relating to increased likelihood of reunification?<sup>114</sup> That is, do FCTPs add value to the substantive due process right of family integrity and, if so, what is it?

This is a difficult question to measure given the variables in the design and implementation of FCTPs. FCTPs have different criteria for parent participation, screening out parents for a range of reasons including physical and sexual abuse allegations, mental illness, previous involvement in child protection or termination of parental rights proceedings, domestic violence, and willingness or ability to enter residential treatment.<sup>115</sup> FCTPs generally have additional resources available even beyond treatment opportunities

---

<sup>112</sup> See Bruns et al., *supra* note 109, at 228; see also Green et al., *supra* note 109, at 57; Worcel et al., *supra* note 109, at 440-41.

<sup>113</sup> Worcel et al., *supra* at 109, at 441.

<sup>114</sup> Green et al., *supra* note 109, at 44 ("Thus, two critical unanswered questions for [FCTPs] are whether they are successful in helping parents succeed in treatment and, if so, whether this makes a difference in terms of their child welfare outcomes.").

<sup>115</sup> PICARD-FRITSCHÉ ET AL., *supra* note 94, at 7-8.

that may enhance the court's work, including additional staff, access to specialized child welfare resources, and funding for achievement incentives.<sup>116</sup> FCTPs vary in their sanctions and incentives; the amount and intensity of attendance at team meetings and court hearings; the level and scope of the judge's involvement; and the role of parents and children's counsel and other stakeholders.<sup>117</sup> They also vary in the stage of the child protective proceeding at which parents can enter the FCTP; whether parents must admit to neglect to be eligible; criteria for removal or visitation with children; and graduation requirements and legal dispositions available to parents, including ultimate dismissal of a case.<sup>118</sup> Finally, during the period that FCTPs began, there were tremendous reform efforts going on simultaneously which could influence outcomes.<sup>119</sup>

These variables matter if FCTPs are to have legitimacy as a reasonable alternative to regular court practice. They matter for advocates counseling clients whether to submit to FCTP jurisdiction. If a parent cannot be shown the advantage of a court that requires them to waive many of their due process rights, to be closely monitored by court staff and the judge, to expect that their attorney may urge them to relate confidential information to the court team, to be subject to sanctions—including incarceration—that are otherwise rarely administered in family court for non-compliance with treatment requirements, and to be uncertain whether this process will have a greater likelihood of success, the lawyer's ethical obligation is to make clear that uncertainty.<sup>120</sup> Until recently, there were

---

<sup>116</sup> Green et al., *supra* note 109, at 44.

<sup>117</sup> *Id.*

<sup>118</sup> ADELE HARRELL & ALICE GOODMAN, THE URBAN INST., REVIEW OF SPECIALIZED FAMILY DRUG COURTS: KEY ISSUES IN HANDLING CHILD ABUSE AND NEGLECT CASES 15-18 (1999), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/410367-Review-of-Specialized-Family-Drug-Courts-Key-Issues-in-Handling-Child-Abuse-and-Neglect-Cases.PDF> [<https://perma.cc/8JH4-56EB>].

<sup>119</sup> *See id.* at 13; *see also* Green et al., *supra* note 109, at 56-57.

<sup>120</sup> N.Y. RULES OF PROF'L CONDUCT r. 1.4 (2013). As the commentary to Rule 1.4 (Communication) explains: "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. . . . In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. . . . The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest and the client's overall requirements as to the character of representation." N.Y. RULES OF PROF'L CONDUCT r. 1.4 cmt. 5 (2013).

few lawyers who were able to offer clients the kind of representation that could both analyze that uncertainty and offer instead an effective rights-based solution.

## V. CREATION OF FAMILY DEFENSE PRACTICE IN NYC

The Center for Family Representation (CFR) was founded in 2002 to create the first multi-disciplinary institutional legal services provider intended to become a viable alternative to an assigned counsel system for parents in child welfare proceedings. Several legal services offices and law school clinical programs had represented parents in these proceedings over the years but none were created for the specific purpose of being routinely assigned by the court to represent parents.<sup>121</sup> CFR's first multi-disciplinary team of a lawyer, social worker and parent advocate began practicing in 2004, the same year that Bronx Defenders hired its first lawyer to represent parents in these proceedings.<sup>122</sup> Like CFR, Bronx Defenders hoped to create a family defense practice that would be the primary provider of legal services for parents in Bronx family court.<sup>123</sup> In 2007, New York City committed to institutional representation for parents by contracting with CFR, Bronx Defenders and the Brooklyn Family Defense Project to represent most of the parents in child welfare proceedings in Manhattan, the Bronx and Brooklyn.<sup>124</sup> CFR expanded its representation to Queens in 2011 and Neighborhood Defender Services (NDS) of Harlem was awarded an additional contract for Harlem neighborhoods in 2014.<sup>125</sup> These organizations share a belief that multi-disciplinary practice provides enhanced representation that results in improved

---

<sup>121</sup> Guggenheim & Jacobs, *supra* note 55, at 44; *see, e.g., Clinics*, N.Y.U. SCH. L., <http://www.law.nyu.edu/academics/clinics> [<https://perma.cc/6REC-S2H4>] (last visited Dec. 1, 2016); *Clinics*, CARDOZO L., <http://www.cardozo.yu.edu/clinics-professional-skills/clinics> [<https://perma.cc/A3PF-M5X9>] (last visited Dec. 1, 2016); *About MFY*, MFY LEGAL SERVICES, <http://www.mfy.org/about/about-mfy/> [<https://perma.cc/H9QB-NCW8>] (last visited Dec. 1, 2016); *Brooklyn Legal Services*, LEGAL SERVICES NYC, <http://www.legalservicesnyc.org/our-program/brooklyn> [<https://perma.cc/Y5CQ-BY3B>] (last visited Dec. 1, 2016); *Bronx Legal Services*, LEGAL SERVICES NYC, <http://www.legalservicesnyc.org/our-program/Bronx> [<https://perma.cc/3UG7-HKSV>] (last visited Dec. 1, 2016).

<sup>122</sup> CTR. FOR FAMILY REPRESENTATION, EVERY FAMILY MATTERS: 10 YEARS OF THE CENTER FOR FAMILY REPRESENTATION 2 (2012), <http://www.cfrny.org/wp-content/uploads/2012/12/Annual-Report-2012.pdf> [<https://perma.cc/N2AV-F8NX>]; *Kara Finck Named Director of Penn Law's Child Advocacy Clinic*, U. PA. L. SCH. (Apr. 10, 2012), <https://www.law.upenn.edu/live/news/2045-kara-finck-named-director-of-penn-laws-child> [<https://perma.cc/J76M-PGQK>] [hereinafter Finck Director].

<sup>123</sup> Finck Director, *supra* note 122.

<sup>124</sup> Guggenheim & Jacobs, *supra* note 55, at 45.

<sup>125</sup> CTR. FOR FAMILY REPRESENTATION, *supra* note 122; Email from Stacy Charland,



outcomes for families. Lawyers advocate for clients in court proceedings, ensuring that legal mandates are followed; social workers help clients identify and secure needed services and assistance; teams with parent advocates—parents who have personally experienced the child welfare system and are now trained professionals—have an additional resource to engage and support frightened and traumatized clients. All of these professionals create plans with their clients that will support children living safely at home.<sup>126</sup> Instead of the ineffective assistance of counsel experienced by parents across the country whose lawyers are unable or unwilling to provide this type of holistic representation, this advocacy ensures that the substantive due process right of family integrity is coupled with the procedural due process protections of fair proceedings that are actually convened and litigated. CFR's outcomes speak directly to this result. At the time the *NYCLA* lawsuit was filed in 2000, over 34,000 children were in foster care in New York City, staying on average over four years.<sup>127</sup> Those numbers declined steadily over the next decade for multiple reasons including overall federal policies that emphasized more timely permanency and family preservation;<sup>128</sup> steady progress by ACS to substitute preventive services for removal of children to foster care;<sup>129</sup> a temporary surge in adoptions;<sup>130</sup> large numbers of children exiting foster care in the first half of the decade;<sup>131</sup> and the creation of institutional representation for parents.<sup>132</sup> In 2007, the year that institutional prov-

---

Managing Attorney, Family Def. Practice, Neighborhood Def. Serv. of Harlem (Dec. 3, 2016, 16:12 EST) (on file with author).

<sup>126</sup> Guggenheim & Jacobs, *supra* note 55, at 45.

<sup>127</sup> RUDOLPH W. GIULIANI ET AL., MAYOR'S MANAGEMENT REPORT 128-29 (2001), <http://www.nycwebmail.com/html/ops/downloads/pdf/mmr/0901vol2.pdf> [<https://perma.cc/M5SN-7EM6>].

<sup>128</sup> ADMIN. ON CHILDREN, YOUTH & FAMILIES, DEP'T OF HEALTH & HUM. SERVS., RECENT DEMOGRAPHIC TRENDS IN FOSTER CARE 4-5 (2013), [https://www.acf.hhs.gov/sites/default/files/cb/data\\_brief\\_foster\\_care\\_trends1.pdf](https://www.acf.hhs.gov/sites/default/files/cb/data_brief_foster_care_trends1.pdf) [<https://perma.cc/CBX6-E5L8>] (noting that New York City had the second largest decline in the country between 2002 and 2012).

<sup>129</sup> MICHAEL R. BLOOMBERG ET AL., MAYOR'S MANAGEMENT REPORT 31-34 (2010), [http://www1.nyc.gov/assets/operations/downloads/pdf/mmr/0910\\_mmr.pdf](http://www1.nyc.gov/assets/operations/downloads/pdf/mmr/0910_mmr.pdf) [<https://perma.cc/336Z-KU2G>].

<sup>130</sup> Kathleen R. DeCataldo & Karen Carroll, *Adoption Now: A Joint Initiative of New York's Courts and Child Welfare System*, CHILD WELFARE, Mar./Apr. 2007, 31, 47-48, <http://www.nycourts.gov/ip/justiceforchildren/NewContent/AdoptionNow.pdf> [<https://perma.cc/YXN7-K8NC>].

<sup>131</sup> *Children Exiting Foster Care by Age Group: New York*, KIDS COUNT DATA CTR., <http://datacenter.kidscount.org/data/line/6274-children-exiting-foster-care-by-age-group?loc=1&loct=2#2/34/false/869,35,18,17,16,15,14,13,12,11/asc/2619,122/13044> [<https://perma.cc/LQZ9-2AL6>] (last visited Dec. 17, 2016).

<sup>132</sup> See *infra* text accompanying note 134.

iders were initially granted contracts, 17,000 children were in care for an average of 11.5 months.<sup>133</sup> By 2012, when institutional providers were representing clients in the four largest boroughs, the number of children had dropped to 14,000, with children averaging 6.8 months in care while children of CFR clients who entered care averaged only 2.5 months; half of the children in CFR cases never entered foster care at all.<sup>134</sup> In 2016, the number of children in foster care in New York City dipped below 10,000 for the first time.<sup>135</sup>

This does not mean that all children are better off because the foster care population has declined; nor does it mean that the child welfare system in New York is now working as intended. Those are questions for another time. This essay, instead, is considering the intersection of significantly improved representation for parents with the purpose and meaning of FCTPs as problem-solving courts. The core legal goals of both the child welfare system generally and FCTPs are to keep children safe while seeking permanency for them and prioritizing permanency by keeping children safely at home and, if that is not possible, in alternative placements that will either lead to reunification or to another permanent resolution through guardianship or adoption.<sup>136</sup> But the methods of this multi-disciplinary representation may clash with the paradigm of the FCTP, calling into question both the purpose and the need of parents submitting to that far more intrusive paradigm.

## VI. IMPACT OF FAMILY DEFENSE ON FAMILY COURT TREATMENT PARTS

Problem-solving courts have been identified as the better of

<sup>133</sup> Andrew White et al., *Homes Away From Home: Foster Parents for a New Generation*, CHILD WELFARE WATCH, Summer 2008, at 1, 2, <http://docslide.us/documents/child-welfare-watch-homes-away-from-home.html> [<https://perma.cc/E3K4-3XVH>]; see also BLOOMBERG ET AL., *supra* note 129, at 31-32 (noting that 16,854 children were in foster care in fiscal year 2007).

<sup>134</sup> Bach, *supra* note 32, at 1074; see also Guggenheim & Jacobs, *supra* note 55, at 46. The average length of stay has increased recently to closer to 5.5 months. This is, in part, because CFR has continued to be successful in keeping more children at home so that the children coming into care are more likely to require more assistance and, in part, because CFR's caseload has aged. Email from Michele Cortese, Exec. Dir., Ctr. for Family Representation (Dec. 2, 2016, 11:45 EST) (on file with author).

<sup>135</sup> #NYCFamilyStrong, N.Y.C. ADMIN. FOR CHILD. SERVICES, <http://www1.nyc.gov/site/acs/about/Events/2016/milestones/twenty.page> [<https://perma.cc/J6G9-7YRD>] (last visited Nov. 14, 2016).

<sup>136</sup> See generally Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. § 1305).

two bad options compared to the current family court, particularly the adversarial, winner-take-all mentality that can permeate family-related proceedings. Professor Claire Huntington has argued that they offer real support in a collaborative process that assists families if they are unable to secure that help before they reach the court.<sup>137</sup> Professor Wendy Bach has responded that turning to problem-solving courts to enhance the “autonomy-conferring support and . . . the right to be protected against inappropriate state action” that Huntington values is the wrong turn.<sup>138</sup> Providing multi-disciplinary representation instead will better accomplish these goals that Huntington identifies.<sup>139</sup> Bach uses CFR as an example of how each member of the multi-disciplinary team described in Part V works to secure the assistance a family needs while holding the state accountable for all of their duties to the family, including providing services that would prevent a child from being removed from her family or return her home sooner.<sup>140</sup> Bach posits that the rights-based approach to child protection proceedings can be the better option if done well.<sup>141</sup> And doing it well in New York City has eliminated the need for FCTPs.

In preparing this article, I spoke to several current and former managerial attorneys in two of the institutional family defense practices in New York City. What follows is based on those conversations as well as a study of the Bronx FCTP from 2005-2010.<sup>142</sup> I think the description captures both how the FCTPs in New York City might have remained a viable alternative for more parents if the recommendations of the *Effective Practices* report had been followed as well as how the FCTP became an unnecessary alternative when parents are provided with the type of family defense representation that is now afforded them in New York City.

One of the core principles of *Effective Practices* is to include all of the stakeholders in the planning and implementation of the FCTP from the beginning to permit everyone’s concerns to be aired and to ensure that everyone is in agreement on the structure

---

<sup>137</sup> Huntington, like Bach, would prefer they receive that assistance in a variety of ways that would eliminate the need for most court proceedings. See, e.g., Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637 (2006); CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* 137-41 (2014).

<sup>138</sup> Bach, *supra* note 32, at 1073. This duty reinforces family integrity by prioritizing family unity or reunification.

<sup>139</sup> *Id.* at 1075.

<sup>140</sup> *Id.* at 1073-76.

<sup>141</sup> *Id.*

<sup>142</sup> PICARD-FRITSCHÉ ET AL., *supra* note 94.

of the FCTP.<sup>143</sup> The Manhattan experience of non-inclusion described above in Part III was mirrored in the Bronx. When Bronx Defenders began its family practice, the first attorney requested to attend any meetings about FCTP; that request was denied.<sup>144</sup> As the family defense organizations grew—and especially after they received City contracts in 2007—the organizations in the Bronx and Manhattan began to have greater leverage and influence in the stakeholder meetings to shape the FCTPs. At the same time, the organizations were analyzing the process, benefits, and detriments to their clients participating in a FCTP, particularly when resources to the FCTPs were cut in the late 2000s.<sup>145</sup>

Counseling clients to participate in FCTP began to turn on four intersecting factors: which judge was presiding, whether and to what extent clients would be able to retain their due process rights, whether the FCTP's treatment components—including providers and drug testers—were competent and appropriate for the clients, and whether the client would be better off in a regular court part with the family defense team working to secure treatment and services.<sup>146</sup> The judge's role, both the administrative judge and the FCTP judge, appeared to be central.<sup>147</sup> Some judges continued to adhere to some or all of the standard FCTP requirements: assessing the potential participant prior to the parent meeting with counsel; requiring an admission of neglect; declining to litigate issues of removal, visitation, or disposition; and rejecting the possibility of a parent receiving an alternative disposition like an adjournment in contemplation of dismissal (ACD).<sup>148</sup> The key issues in parent advocates' reluctance to recommend that their clients participate in FCTP were, first, that an admission precluded

---

<sup>143</sup> EFFECTIVE PRACTICES, *supra* note 92, at 39.

<sup>144</sup> Interview with Kara Finck, *supra* note 97; PICARD-FRITSCHÉ ET AL., *supra* note 94, at 11.

<sup>145</sup> Interview with Kara Finck, *supra* note 97; Interview with Michele Cortese, *supra* note 105.

<sup>146</sup> Interview with Kara Finck, *supra* note 97; Interview with Michele Cortese, *supra* note 105; Interview with Emma Ketteringham, Managing Attorney, Family Defense Practice, The Bronx Defenders (Mar. 28, 2016); PICARD-FRITSCHÉ ET AL., *supra* note 94, at 44-45.

<sup>147</sup> Interview with Kara Finck, *supra* note 97; Interview with Emma Ketteringham, *supra* note 146; PICARD-FRITSCHÉ ET AL., *supra* note 94, at vi, 45 (determining that the presiding judge had more influence over the parent's perception of fairness than any other factor).

<sup>148</sup> Interview with Kara Finck, *supra* note 97; Interview with Michele Cortese, *supra* note 105; Interview with Emma Ketteringham, *supra* note 146; PICARD-FRITSCHÉ ET AL., *supra* note 94, at 13, 44 (noting changes in practices that began in 2011, including some judges permitting entrance to FCTP after a litigated fact-finding hearing and changing some of the eligibility criteria to broaden the qualifying types of parents).

the parent from requesting the immediate return of a removed child and, second, that the parent's successful completion of FCTP could not result in a disposition that dismissed the case.<sup>149</sup> Parents would be subjected to more frequent and greater court supervision without the opportunity of having their graduation from FCTP result in as good a legal outcome, such as dismissal of a case after an ACD, as in a regular part.<sup>150</sup> Even if some of these requirements were waived, counsel was still concerned about the accuracy of the drug testing (and the inability to challenge the tests), the availability and effectiveness of the treatment providers associated with the FCTP, the abstinence-only rather than harm-reduction approach to treatment, and the quality of the treatment reports being sent to the FCTP.<sup>151</sup> Participating in FCTP also didn't improve parent's access to the instrumental services they needed, like housing, employment and public benefits.<sup>152</sup> In fact, outcomes in the Bronx FTCP on child removal, time to permanency, and reunification were no better than in the regular child protection parts, with time to permanency taking considerably longer in FCTP.<sup>153</sup> And as resources were cut for the FCTPs over time, and the quality of the resource team diminished, there was greater turnover of dedicated staff who understood substance abuse and treatment, and the model began to be dismantled. Across the city, responsibility for the FCTPs was distributed among more judges; the central component of frequent and meaningful court monitoring was harder to maintain; in at least one New York City borough, FCTP staff were assigned to cases in the regular court parts rather than in a special court part; in another borough the court administers the FCTP only intermittently. The *Effective Practices* guidelines were never employed.<sup>154</sup>

The role of the family defense organizations in the demise of the FCTP is apparent and significant. In creating effective multi-disciplinary teams, these organizations combine successful litigation strategies with securing the treatment and resources their clients need without subjecting their clients to additional court

---

<sup>149</sup> PICARD-FRITSCHÉ ET AL., *supra* note 94, at 14.

<sup>150</sup> Interview with Kara Finck, *supra* note 97.

<sup>151</sup> Interview with Kara Finck, *supra* note 97; Interview with Michele Cortese, *supra* note 105; Interview with Emma Ketteringham, *supra* note 146.

<sup>152</sup> PICARD-FRITSCHÉ ET AL., *supra* note 94, at 33. This appears to be different than in other FCTPs where services are more available and accessible. See Green et al., *supra* note 109, at 56.

<sup>153</sup> PICARD-FRITSCHÉ ET AL., *supra* note 94, at iii.

<sup>154</sup> Interview with Michele Cortese, *supra* note 105; Interview with Emma Ketteringham, *supra* note 146; Interview with Kara Finck, *supra* note 97.

supervision and, in fact, securing better legal and permanency outcomes. The decision to stop recommending that most of their clients participate in FCTPs was consistent with their ethical duty of loyalty to their clients.<sup>155</sup> While family defense advocates were urged by the court to continue referring clients to participate, they couldn't justify counseling clients to participate because their primary loyalty was to their client and not to the FCTP. In the 2.5 years that NDS has represented parents in child welfare proceedings in Manhattan, three clients have participated in the Manhattan FCTP; the other organizations rarely identify a client who would be better off participating in the FCTP than in a regular court part.<sup>156</sup>

## VII. LESSONS

An FCTP that is created and managed according to the *Effective Practices* guidelines has greater likelihood of responding to the concerns of attorneys for parents who are reluctant to counsel their clients to participate in a FCTP. This is, in part, because the parent attorneys would have helped establish the rules from the beginning; would be deeply knowledgeable about the advantages or concerns for any particular client; would be fully participating in all aspects of the meeting and court processes by their client's side; and would have the opportunity to shape the FCTP going forward. That said, unless there are advantages to the client that outweigh the disadvantages, a robust parent defense bar adds greater value to maintaining family integrity than participating in a FCTP.<sup>157</sup> Family defense practices have their own professional teams supporting parents, securing treatment and other services, protecting due process rights, and keeping or reunifying families safely and more quickly with less court involvement and supervision. All this is done without putting into jeopardy the loyalty central to the attorney-client relationship that encourages parents to communicate freely and honestly with their confidential trusted advisors.

---

<sup>155</sup> Client loyalty requires careful adherence to confidentiality, diligence, and communication with clients. See N.Y. RULES OF PROF'L CONDUCT *ET AL.* 1.3, 1.4, 1.6 (2013).

<sup>156</sup> Interview with Michele Cortese, *supra* note 105; Interview with Emma Ketteringham, *supra* note 146; Interview with Kara Finck, *supra* note 97; Email from Stacy Charland, *supra* note 125; PICARD-FRITSCHÉ *ET AL.*, *supra* note 94, at 44.

<sup>157</sup> Several of the attorneys noted that some clients respond well to constant court monitoring and team supports but that often turns on the judge and the team. This is consistent with the "judge effect" finding that the presiding judge has more influence over the perceptions of the parent than whether the parent participates in the FCTP. PICARD-FRITSCHÉ *ET AL.*, *supra* note 94, at vi, 4.

The New York court system continues to encourage FCTPs and FCTP practices. A committee was recently convened “to explore changes in [FCTP] policy or practice that might encourage more parents to engage in [FCTP]” as well as to provide new thinking to counties “that want to infuse their non-[FCTPs] with new routines targeted to families impacted by addiction.”<sup>158</sup> This committee included family defense counsel, attorneys representing state and county social services agencies and children, and court personnel. Their recommendations capture the tensions about FCTPs described in this essay. Members of the committee disagreed about whether an admission to neglect was necessary to participate in the FCTP; whether other due process rights, like litigating removals or dispositions, had to be waived; the quality of treatment and whether the best types of treatment were being considered; the appropriate role for the FCTP staff, especially their input into non-treatment issues like child development or domestic violence; and whether the FCTP team was trained and knowledgeable about a range of issues including trauma-informed practice, cultural and gender contexts, and the variety of approaches to substance use treatment. A key concern was that parents would not be forthcoming about their substance use if they did not make an admission to neglect and that the purpose of the FCTP to focus on treatment rather than legal issues would be undermined.<sup>159</sup> The core response from parents’ attorneys was that without the flexibility of having the ability to litigate child welfare legal issues like removal or return home—as well as the option of not making an admission to participate in the FCTP—and an overall reconsideration of types and appropriateness of treatment modalities, they could not counsel their clients to participate in FCTP.<sup>160</sup>

The number of FCTPs in New York State has gone from a high of 50 to half that number currently.<sup>161</sup> In New York City, the FCTPs are a skeleton of what they were, in large part because family defense counsel will not advise their clients to participate in a process that neither protects their due process rights nor provides them

---

<sup>158</sup> ENGAGEMENT OF COUNSEL AND PARTIES SUBCOMM., RECOMMENDATIONS (2015) (on file with CUNY Law Review).

<sup>159</sup> *Id.* These disagreements were not all role-based; some county attorneys, for example, were not opposed to FCTP participation without an admission.

<sup>160</sup> *Id.*

<sup>161</sup> PICARD-FRITSCHÉ ET AL., *supra* note 94, at ii; Christine Kiesel, Coordinator, N.Y. Child Welfare Court Improvement Project, Statement at the Statewide Multidisciplinary Child Welfare Work Group (Apr. 18, 2016).

with better treatment or services than their own advocates secure for them without being subject to intrusive monitoring and supervision by the court. The quality of family defense is likely to continue to improve in New York State and across the country. The New York State Office of Indigent Legal Services has recently issued *Standards for Parental Representation in State Intervention Matters* and sponsored a statewide family defense conference in 2015.<sup>162</sup> The ABA Center on Children and the Law has now embraced parent representation through its National Alliance for Parent Representation, which has sponsored four national conferences on parent representation and recently issued *Representing Parents in Child Welfare Cases*, written by the preeminent parent advocates and scholars in the country.<sup>163</sup> Innovative models of parent representation are being developed nationwide.<sup>164</sup>

Previously a small number of scholars warned about the dangers of creating problem-solving courts like FCTPs; their warnings did not stop the proliferation of these courts.<sup>165</sup> Vigorous, multi-disciplinary parent representation has protected the right of family integrity and improved outcomes for families and children while, in its wake, challenging the very existence of these courts.

---

<sup>162</sup> STANDARDS FOR PARENTAL REPRESENTATION IN STATE INTERVENTION MATTERS (N.Y. STATE OFFICE OF INDIGENT LEGAL SERVS. 2015), <https://www.ils.ny.gov/files/Parental%20Representation%20Standards%20Final%20110615.pdf> [<https://perma.cc/QQ3B-J3EH>]; BECAUSE ALL FAMILIES MATTER: ENHANCING PARENTAL DEFENSE IN NEW YORK, N.Y. ST. DEFENDERS ASS'N, <http://us10.campaign-archive1.com/?u=9dc0582cbff834483f0bee296&id=5163aa54aa&e=85746d67b8> [<https://perma.cc/B5B5-LA64>] (last visited Dec. 8, 2016).

<sup>163</sup> REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS 17 (Martin Guggenheim & Vivek S. Sankaran eds., 2015).

<sup>164</sup> CTR. ON CHILDREN & THE LAW, AM. BAR ASS'N, SUMMARY OF PARENT REPRESENTATION MODELS (2009), [http://www.americanbar.org/content/dam/aba/publications/center\\_on\\_children\\_and\\_the\\_law/parentrepresentation/summary\\_parentrep\\_model.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/summary_parentrep_model.authcheckdam.pdf) [<https://perma.cc/Q974-WUL4>].

<sup>165</sup> See, e.g., JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT (2001); Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205 (1998); Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513 (2003); Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479 (2004); Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender about Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37 (2001).