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I N S E N A T E

January 21, 2014

Introduced by Sen. KENNEDY -- read twice and ordered printed, and when printed to be committed to the Committee on Children and Families

AN ACT to amend the social services law and the family court act, in relation to proof of a neglected or abused child

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Legislative findings. The legislature finds and declares  
2 that infants who are born drug-exposed and drug-addicted must be a  
3 priority of our state's public health and child welfare systems. Ille-  
4 gal drug addiction in pregnant women and corresponding fetal drug expo-  
5 sure is an epidemic that has expanded in virtually geometric proportion  
6 since the 1980's with the advent of cheap, smokeable free base crack  
7 cocaine.

8 A large body of professional literature from the fields of pediatrics,  
9 obstetrics and the social sciences has documented a multi-million dollar  
10 problem whose effect on a generation of young Americans is still being  
11 discovered. Unfortunately, the laws and jurisprudence of the state of  
12 New York have failed to adequately and appropriately address this  
13 burgeoning crisis.

14 The legislature further finds and declares that illegal drug use  
15 during pregnancy creates a high degree of risk that newborns will exhib-  
16 it neurobehavioral and circulatory health complications. These compli-  
17 cations include neurological defects, learning disabilities, low cogni-  
18 tion, physical and developmental delay, and low birth weight.

19 Moreover, other states have recognized in utero drug exposure as  
20 correlative to the likelihood of further abuse or neglect during the  
21 child's infancy. Such recognition has led to statutory revisions causing  
22 in utero drug exposure to be presumptive evidence of child abuse or  
23 neglect and thereby warranting immediate child protective services  
24 intervention.

25 The intervention of the state into the integrity of the family unit  
26 should be exercised cautiously. However, where the very life and safety  
27 of the most vulnerable segment of society is in question, the inter-  
28 vention of the state must be aggressive and consistent.

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets  
[ ] is old law to be omitted.

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1 Under the current appellate case law in this state, proof of illegal  
2 drug abuse during pregnancy as manifested by a positive toxicology  
3 report for drugs in the child is insufficient in and of itself to  
4 support a fact finding of child neglect under article 10 of the family  
5 court act.

6 Current state office of children and family services policy states:  
7 "Evidence that a newborn infant tests positive for a drug....in its  
8 bloodstream or urine; is born dependent on drugs or with drug withdrawal  
9 symptoms....; or has been diagnosed as having a condition which may be  
10 attributable to in utero exposure to drugs....is not sufficient, in and  
11 of itself, to support a determination that the child is mistreated. In  
12 addition, such evidence alone is not sufficient for a social service  
13 district to take protective custody of such a child."

14 As a consequence, a positive toxicology report, without additional  
15 supporting evidence, may not be used to "indicate" a report of child  
16 abuse or maltreatment to the State Central Register of Abuse and  
17 Maltreatment. This policy creates an unacceptable risk to New York's  
18 most vulnerable citizens: newborn infants.

19 At present, infants born with such a positive toxicology must, without  
20 additional evidence of neglect, be discharged home without mandating  
21 support, supervision or intervention - only to await the occurrence of  
22 other neglect, injury or even death before protective action can be  
23 taken.

24 While intending to protect children, laws that essentially require the  
25 child to be injured or harmed before help is offered are fatally flawed.  
26 The tragic consequences of such defective laws are needless and avoid-  
27 able particularly when at the time of birth authorities are aware of an  
28 immediate problem.

29 The legislature finds that more than sufficient research and scholar-  
30 ship exist to find the strongest possible causation between illegal drug  
31 use during pregnancy and risk to the health and welfare of a child. It  
32 is therefore the intent of this legislature that proof of illegal drug  
33 use during pregnancy as manifested by a positive toxicology report is,  
34 in and of itself, the basis for a prima facie finding that the child is  
35 a neglected child.

36 S 2. Subdivision 4-a of section 371 of the social services law, as  
37 added by chapter 782 of the laws of 1971, subparagraph (B) of paragraph  
38 (i) as amended by chapter 984 of the laws of 1981, is amended to read as  
39 follows:

40 4-a. "Neglected child" means a child less than eighteen years of age  
41 (i) whose physical, mental or emotional condition has been impaired or  
42 is in imminent danger of becoming impaired as a result of the failure of  
43 his OR HER parent or other person legally responsible for his OR HER  
44 care to exercise a minimum degree of care

45 (A) in supplying the child with adequate food, clothing, shelter,  
46 education, medical or surgical care, though financially able to do so or  
47 offered financial or other reasonable means to do so; or

48 (B) in providing the child with proper supervision or guardianship, by  
49 unreasonably inflicting or allowing to be inflicted harm, or a substan-  
50 tial risk thereof, including the infliction of excessive corporal  
51 punishment; or by misusing a drug or drugs; or by misusing alcoholic  
52 beverages to the extent that he OR SHE loses self-control of his OR HER  
53 actions; or by any other acts of a similarly serious nature requiring  
54 the aid of the court; provided, however, that where the respondent is  
55 voluntarily and regularly participating in a rehabilitative program,  
56 evidence that the respondent has repeatedly misused a drug or drugs or

1 alcoholic beverages to the extent that he OR SHE loses self-control of  
2 his OR HER actions shall not establish that the child is a neglected  
3 child in the absence of evidence establishing that the child's physical,  
4 mental or emotional condition has been impaired or is in imminent danger  
5 of becoming impaired as set forth in THIS paragraph [(i) of this subdi-  
6 vision]; or

7 (ii) WHO, AS A NEWBORN INFANT, TESTS POSITIVE FOR A CONTROLLED  
8 SUBSTANCE NOT PRESCRIBED BY A PHYSICIAN, IN HIS OR HER BLOODSTREAM OR  
9 URINE, IS BORN DEPENDENT ON SUCH DRUGS OR DEMONSTRATES DRUG WITHDRAWAL  
10 SYMPTOMS, OR HAS BEEN DIAGNOSED AS HAVING A CONDITION WHICH IS ATTRIBUT-  
11 ABLE TO IN UTERO EXPOSURE TO ILLEGAL DRUGS; OR

12 (III) who has been abandoned by his OR HER parents or other person  
13 legally responsible for his OR HER care.

14 S 3. Subdivision (f) of section 1012 of the family court act, as added  
15 by chapter 962 of the laws of 1970, subparagraph (A) of paragraph (i) as  
16 amended by chapter 469 of the laws of 1971, subparagraph (B) of para-  
17 graph (i) as amended by chapter 984 of the laws of 1981 and paragraph  
18 (ii) as amended by chapter 666 of the laws of 1976, is amended to read  
19 as follows:

20 (f) "Neglected child" means a child less than eighteen years of age

21 (i) whose physical, mental or emotional condition has been impaired or  
22 is in imminent danger of becoming impaired as a result of the failure of  
23 his OR HER parent or other person legally responsible for his OR HER  
24 care to exercise a minimum degree of care

25 (A) in supplying the child with adequate food, clothing, shelter or  
26 education in accordance with the provisions of part one of article  
27 sixty-five of the education law, or medical, dental, optometrical or  
28 surgical care, though financially able to do so or offered financial or  
29 other reasonable means to do so; or

30 (B) in providing the child with proper supervision or guardianship, by  
31 unreasonably inflicting or allowing to be inflicted harm, or a substan-  
32 tial risk thereof, including the infliction of excessive corporal  
33 punishment; or by misusing a drug or drugs; or by misusing alcoholic  
34 beverages to the extent that he OR SHE loses self-control of his OR HER  
35 actions; or by any other acts of a similarly serious nature requiring  
36 the aid of the court; provided, however, that where the respondent is  
37 voluntarily and regularly participating in a rehabilitative program,  
38 evidence that the respondent has repeatedly misused a drug or drugs or  
39 alcoholic beverages to the extent that he OR SHE loses self-control of  
40 his OR HER actions shall not establish that the child is a neglected  
41 child in the absence of evidence establishing that the child's physical,  
42 mental or emotional condition has been impaired or is in imminent danger  
43 of becoming impaired as set forth in THIS paragraph [(i) of this subdi-  
44 vision]; or

45 (ii) WHO, AS A NEWBORN INFANT, TESTS POSITIVE FOR A CONTROLLED  
46 SUBSTANCE NOT PRESCRIBED BY A PHYSICIAN, IN HIS OR HER BLOODSTREAM OR  
47 URINE, IS BORN DEPENDENT ON SUCH DRUGS OR DEMONSTRATES DRUG WITHDRAWAL  
48 SYMPTOMS, OR HAS BEEN DIAGNOSED AS HAVING A CONDITION WHICH IS ATTRIBUT-  
49 ABLE TO IN UTERO EXPOSURE TO ILLEGAL DRUGS; OR

50 (III) who has been abandoned, in accordance with the definition and  
51 other criteria set forth in subdivision five of section three hundred  
52 eighty-four-b of the social services law, by his OR HER parents or other  
53 person legally responsible for his OR HER care.

54 S 4. Subdivision (b) of section 1028 of the family court act, as  
55 amended by chapter 145 of the laws of 2000, is amended to read as  
56 follows:

1 (b) In determining whether temporary removal of the child is necessary  
2 to avoid imminent risk to the child's life or health, the court shall  
3 consider and determine in its order whether continuation in the child's  
4 home would be contrary to the best interests of the child and where  
5 appropriate, whether reasonable efforts were made prior to the date of  
6 the hearing to prevent or eliminate the need for removal of the child  
7 from the home and where appropriate, whether reasonable efforts were  
8 made after removal of the child to make it possible for the child to  
9 safely return home.

10 IN A CASE INVOLVING A NEWBORN INFANT TESTING POSITIVE FOR A CONTROLLED  
11 SUBSTANCE NOT PRESCRIBED BY A PHYSICIAN, IN HIS OR HER BLOODSTREAM OR  
12 URINE, BORN DEPENDENT ON SUCH DRUGS, DEMONSTRATING DRUG WITHDRAWAL SYMP-  
13 TOMS, OR HAVING BEEN DIAGNOSED AS HAVING A CONDITION WHICH IS ATTRIBUT-  
14 ABLE TO IN UTERO EXPOSURE TO ILLEGAL DRUGS, SUCH STATUS OF THE CHILD  
15 SHALL ESTABLISH A REBUTTABLE PRESUMPTION THAT THE RELEASE OF THE INFANT  
16 TO THE PARENT PRESENTS AN IMMINENT DANGER TO THE CHILD'S LIFE OR HEALTH.

17 S 5. Paragraphs (vii) and (viii) of subdivision (a) of section 1046 of  
18 the family court act, paragraph (vii) as amended by chapter 432 of the  
19 laws of 1993 and paragraph (viii) as added by chapter 1015 of the laws  
20 of 1972, are amended and a new paragraph (ix) is added to read as  
21 follows:

22 (vii) neither the privilege attaching to confidential communications  
23 between husband and wife, as set forth in section forty-five hundred two  
24 of the civil practice law and rules, nor the physician-patient and  
25 related privileges, as set forth in section forty-five hundred four of  
26 the civil practice law and rules, nor the psychologist-client privilege,  
27 as set forth in section forty-five hundred seven of the civil practice  
28 law and rules, nor the social worker-client privilege, as set forth in  
29 section forty-five hundred eight of the civil practice law and rules,  
30 nor the rape crisis counselor-client privilege, as set forth in section  
31 forty-five hundred ten of the civil practice law and rules, shall be a  
32 ground for excluding evidence which otherwise would be admissible[.];  
33 AND

34 (viii) proof of the "impairment of emotional health" or "impairment of  
35 mental or emotional condition" as a result of the unwillingness or  
36 inability of the respondent to exercise a minimum degree of care toward  
37 a child may include competent opinion or expert testimony and may  
38 include proof that such impairment lessened during a period when the  
39 child was in the care, custody or supervision of a person or agency  
40 other than the respondent[.]; AND

41 (IX) PROOF THAT A NEWBORN INFANT TESTS POSITIVE FOR A CONTROLLED  
42 SUBSTANCE NOT PRESCRIBED BY A PHYSICIAN, IN HIS OR HER BLOODSTREAM OR  
43 URINE, IS BORN DEPENDENT ON SUCH DRUGS, DEMONSTRATES DRUG WITHDRAWAL  
44 SYMPTOMS, OR HAS BEEN DIAGNOSED AS HAVING A CONDITION WHICH IS ATTRIBUT-  
45 ABLE TO IN UTERO EXPOSURE TO ILLEGAL DRUGS SHALL BE PRIMA FACIE PROOF OF  
46 NEGLECT.

47 S 6. Subdivision (d) of section 1051 of the family court act, as  
48 amended by chapter 478 of the laws of 1988, is amended to read as  
49 follows:

50 (d) If the court makes a finding of abuse or neglect, it shall deter-  
51 mine, based upon the facts adduced during the fact-finding hearing and  
52 any other additional facts presented to it, whether a preliminary order  
53 pursuant to section one thousand twenty-seven OF THIS ARTICLE is  
54 required to protect the child's interests pending a final order of  
55 disposition. The court shall state the grounds for its determination. In  
56 addition, a child found to be abused or neglected may be removed and

1 remanded to a place approved for such purpose by the local social  
2 services department or be placed in the custody of a suitable person,  
3 pending a final order of disposition, if the court finds that there is a  
4 substantial probability that the final order of disposition will be an  
5 order of placement under section one thousand fifty-five OF THIS PART.  
6 In determining whether substantial probability exists, the court shall  
7 consider the requirements of subdivision (b) of section one thousand  
8 fifty-two OF THIS PART. PROVIDED, HOWEVER, THAT IN A CASE INVOLVING A  
9 NEWBORN INFANT TESTING POSITIVE FOR A CONTROLLED SUBSTANCE NOT  
10 PRESCRIBED BY A PHYSICIAN, IN HIS OR HER BLOODSTREAM OR URINE, BORN  
11 DEPENDENT ON SUCH DRUGS, DEMONSTRATING DRUG WITHDRAWAL SYMPTOMS, OR  
12 HAVING BEEN DIAGNOSED AS HAVING A CONDITION WHICH IS ATTRIBUTABLE TO IN  
13 UTERO EXPOSURE TO ILLEGAL DRUGS, SUCH STATUS OF THE CHILD SHALL ESTAB-  
14 LISH A REBUTTABLE PRESUMPTION THAT THE RELEASE OF THE INFANT TO THE  
15 PARENT PRESENTS AN IMMINENT DANGER TO THE CHILD'S LIFE OR HEALTH.  
16 S 7. This act shall take effect immediately.