

4563

2009-2010 Regular Sessions

I N   A S S E M B L Y

February 5, 2009

---

Introduced by M. of A. MAYERSOHN, NOLAN, CANESTRARI, PERRY, GALEF, HOOPER, GABRYSZAK -- Multi-Sponsored by -- M. of A. ALFANO, BARRA, McENEANY, SEMINERIO, SWEENEY, WEPRIN -- read once and referred 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

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

LBD04502-01-9

1 neglect and thereby warranting immediate child protective services  
2 intervention.

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

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

12 Current New York state office of children and family services policy  
13 states: "Evidence that a newborn infant tests positive for a  
14 drug.....in its bloodstream or urine; is born dependent on drugs or with  
15 drug withdrawal symptoms....; or has been diagnosed as having a condi-  
16 tion which may be attributable to in utero exposure to drugs.....is not  
17 sufficient, in and of itself, to support a determination that the child  
18 is mistreated. In addition, such evidence alone is not sufficient for a  
19 social service district to take protective custody of such a child."

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

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

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

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

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

46 4-a. "Neglected child" means a child less than eighteen years of age  
47 (i) whose physical, mental or emotional condition has been impaired or  
48 is in imminent danger of becoming impaired as a result of the failure of  
49 his OR HER parent or other person legally responsible for his OR HER  
50 care to exercise a minimum degree of care

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

54 (B) in providing the child with proper supervision or guardianship, by  
55 unreasonably inflicting or allowing to be inflicted harm, or a substan-  
56 tial risk thereof, including the infliction of excessive corporal

1 punishment; or by misusing a drug or drugs; or by misusing alcoholic  
2 beverages to the extent that he OR SHE loses self-control of his OR HER  
3 actions; or by any other acts of a similarly serious nature requiring  
4 the aid of the court; provided, however, that where the respondent is  
5 voluntarily and regularly participating in a rehabilitative program,  
6 evidence that the respondent has repeatedly misused a drug or drugs or  
7 alcoholic beverages to the extent that he OR SHE loses self-control of  
8 his OR HER actions shall not establish that the child is a neglected  
9 child in the absence of evidence establishing that the child's physical,  
10 mental or emotional condition has been impaired or is in imminent danger  
11 of becoming impaired as set forth in THIS paragraph [(i) of this subdi-  
12 vision]; or

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

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

20 S 3. Subdivision (f) of section 1012 of the family court act, as added  
21 by chapter 962 of the laws of 1970, subparagraph (A) of paragraph (i) as  
22 amended by chapter 469 of the laws of 1971, subparagraph (B) of para-  
23 graph (i) as amended by chapter 984 of the laws of 1981 and paragraph  
24 (ii) as amended by chapter 666 of the laws of 1976, is amended to read  
25 as follows:

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

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

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

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

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

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

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

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

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

24 S 5. Paragraphs (vii) and (viii) of subdivision (a) of section 1046 of  
25 the family court act, paragraph (vii) as amended by chapter 432 of the  
26 laws of 1993 and paragraph (viii) as added by chapter 1015 of the laws  
27 of 1972, are amended and a new paragraph (ix) is added to read as  
28 follows:

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

41 (viii) proof of the "impairment of emotional health" or "impairment of  
42 mental or emotional condition" as a result of the unwillingness or  
43 inability of the respondent to exercise a minimum degree of care toward  
44 a child may include competent opinion or expert testimony and may  
45 include proof that such impairment lessened during a period when the  
46 child was in the care, custody or supervision of a person or agency  
47 other than the respondent[.]; AND

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

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

1 (d) If the court makes a finding of abuse or neglect, it shall deter-  
2 mine, based upon the facts adduced during the fact-finding hearing and  
3 any other additional facts presented to it, whether a preliminary order  
4 pursuant to section one thousand twenty-seven OF THIS ARTICLE is  
5 required to protect the child's interests pending a final order of  
6 disposition. The court shall state the grounds for its determination. In  
7 addition, a child found to be abused or neglected may be removed and  
8 remanded to a place approved for such purpose by the local social  
9 services department or be placed in the custody of a suitable person,  
10 pending a final order of disposition, if the court finds that there is a  
11 substantial probability that the final order of disposition will be an  
12 order of placement under section one thousand fifty-five OF THIS PART.  
13 In determining whether substantial probability exists, the court shall  
14 consider the requirements of subdivision (b) of section one thousand  
15 fifty-two OF THIS PART. PROVIDED, HOWEVER, THAT IN A CASE INVOLVING A  
16 NEWBORN INFANT TESTING POSITIVE FOR A CONTROLLED SUBSTANCE NOT  
17 PRESCRIBED BY A PHYSICIAN, IN HIS OR HER BLOODSTREAM OR URINE, BORN  
18 DEPENDENT ON SUCH DRUGS, DEMONSTRATING DRUG WITHDRAWAL SYMPTOMS, OR  
19 HAVING BEEN DIAGNOSED AS HAVING A CONDITION WHICH IS ATTRIBUTABLE TO IN  
20 UTERO EXPOSURE TO ILLEGAL DRUGS, SUCH STATUS OF THE CHILD SHALL ESTAB-  
21 LISH A REBUTTABLE PRESUMPTION THAT THE RELEASE OF THE INFANT TO THE  
22 PARENT PRESENTS AN IMMINENT DANGER TO THE CHILD'S LIFE OR HEALTH.  
23 S 7. This act shall take effect immediately.