S T A T E O F N E W Y O R K

6239

2009-2010 Regular Sessions

I N S E N A T E

October 21, 2009

Introduced by Sen. KLEIN -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

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:

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

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

The legislature further finds and declares that illegal drug use during pregnancy creates a high degree of risk that newborns will exhibit neurobehavioral and circulatory health complications. These complications include neurological defects, learning disabilities, low cognition, physical and developmental delay, and low birth weight.

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

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

LBD04502-01-9

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

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

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

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

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

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

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

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

4-a. "Neglected child" means a child less than eighteen years of age

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

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

(B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he OR SHE loses self-control of his OR HER

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

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

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

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

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

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

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

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

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

(III) who has been abandoned, in accordance with the definition and other criteria set forth in subdivision five of section three hundred

eighty-four-b of the social services law, by his OR HER parents or other person legally responsible for his OR HER care.

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

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

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

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

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

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

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

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

(d) If the court makes a finding of abuse or neglect, it shall determine, based upon the facts adduced during the fact-finding hearing and

any other additional facts presented to it, whether a preliminary order pursuant to section one thousand twenty-seven OF THIS ARTICLE is required to protect the child's interests pending a final order of disposition. The court shall state the grounds for its determination. In addition, a child found to be abused or neglected may be removed and remanded to a place approved for such purpose by the local social services department or be placed in the custody of a suitable person, pending a final order of disposition, if the court finds that there is a substantial probability that the final order of disposition will be an order of placement under section one thousand fifty-five OF THIS PART. In determining whether substantial probability exists, the court shall consider the requirements of subdivision (b) of section one thousand fifty-two OF THIS PART. PROVIDED, HOWEVER, THAT IN A CASE INVOLVING A NEWBORN INFANT TESTING POSITIVE FOR A CONTROLLED SUBSTANCE NOT PRESCRIBED BY A PHYSICIAN, IN HIS OR HER BLOODSTREAM OR URINE, BORN DEPENDENT ON SUCH DRUGS, DEMONSTRATING DRUG WITHDRAWAL SYMPTOMS, OR HAVING BEEN DIAGNOSED AS HAVING A CONDITION WHICH IS ATTRIBUTABLE TO IN UTERO EXPOSURE TO ILLEGAL DRUGS, SUCH STATUS OF THE CHILD SHALL ESTABLISH A REBUTTABLE PRESUMPTION THAT THE RELEASE OF THE INFANT TO THE PARENT PRESENTS AN IMMINENT DANGER TO THE CHILD'S LIFE OR HEALTH.

S 7. This act shall take effect immediately.