

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 ASSEM-
BLY, 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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