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I N A S S E M B L Y

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Introduced by M. of A. SIMANOWITZ -- 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
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:

(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

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.