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

3786

2013-2014 Regular Sessions

I N S E N A T E

February 15, 2013

Introduced by Sen. ADAMS -- read twice and ordered printed, and when printed to be committed to the Committee on Social Services

AN ACT to amend the social services law, the criminal procedure law and the civil practice law and rules, in relation to assisting and protecting victims of domestic violence, child abuse and child neglect

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

Section 1. Legislative intent. Presently, a person convicted of harassment, which is only a violation under the penal law, enjoys an automatic seal on his or her criminal record. Harassment often includes matters of domestic violence. In subsequent proceedings between the victim of the violence and the convicted aggressor, the record of the criminal court, the police arrest and investigation, and the aggressor's conviction, admissions or orders of protection in the criminal matter are not available to the victim to prove that the domestic violence occurred; making it difficult for the victim to protect himself or herself against further aggression or obtain justice in family court or other civil proceedings. This act will allow the victim or victim's representative to obtain a judicial subpoena releasing such record to the family or supreme court.

Likewise, where an investigation by child protective services "indicates" the abuse or neglect of a child, the state law allows the subject of the report the ability to amend the report to "unfounded" without any notice or opportunity to object to the amendment being given to the victim of the abuse or neglect. As a result, if amended, even by default, the victim or co-parent cannot access the record of the investigation in subsequent family or supreme court proceedings. Further, the person previously "indicated" can use the amended report as a weapon against the opposing party to show that their allegation, or belief in the allegation, was frivolous. Even where the "indicated" finding is properly amended to "unfounded," and the accused was frivolously victim-

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

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ized by the allegations of their opposing party, the reporting law shields the identity of the false reporter. This act, therefore, protects the victims of child abuse, child neglect and wrongful accusations of child abuse and neglect by opening the records of the central registry by judicial subpoena.

Finally, the state legislature enacted a hearsay exception to a child's statements of abuse or neglect in section 1065 of the family court act. Justifiably, if not technically correct, the state's appellate courts have expanded such section's exception to custody, divorce and child support proceedings. However, this exception is not currently available in every matter where domestic violence, child abuse or child neglect may be at issue (i.e. surrogate court matters, tort actions, or family offenses). This act allows the judges, parens patria, to provide further protection to children in consideration of their particular emotional immaturity and fragility, while preventing convictions on only the allegations of a child.

S 2. Subparagraphs (iv) and (v) of paragraph (a) of subdivision 5 of section 422 of the social services law, as amended by chapter 555 of the laws of 2000, are amended to read as follows:

(iv) to the subject of the report; [and]

(v) to a district attorney, an assistant district attorney, an investigator employed in the office of a district attorney, or to a sworn officer of the division of state police, of a city, county, town or village police department or of a county sheriff's office when such official verifies that the report is necessary to conduct an active investigation or prosecution of a violation of subdivision three of section 240.55 of the penal law; AND

(VI) ON JUDICIAL SUBPOENA OF THE FAMILY OR SUPREME COURT WHERE THE PROTECTION OF A CHILD OR A FALSE ALLEGATION OF CHILD ABUSE OR NEGLECT IS AT ISSUE AND THE SUBJECT OF THE REPORT IS A PARTY TO AN ACTION THEREIN.

S 3. Subdivision 7 of section 422 of the social services law, as amended by chapter 434 of the laws of 1989, is amended to read as follows:

7. At any time, a subject of a report [and], other persons named in the report OR THEIR GUARDIANS OR CUSTODIANS, AND THE FAMILY OR SUPREME COURT BY JUDICIAL SUBPOENA AND WHERE THE PROTECTION OF A CHILD OR FALSE ALLEGATIONS OF CHILD ABUSE OR NEGLECT IS AT ISSUE AND THE SUBJECT OF THE REPORT IS A PARTY TO AN ACTION THEREIN, may receive, upon request, a copy of all information contained in the central register; provided, however, that the commissioner is authorized, EXCEPT WHEN THE REQUEST IS MADE BY JUDICIAL SUBPOENA AND THE REPORTER IS A PARTY TO THE ACTION, to prohibit the release of data that would identify the person who made the report or who cooperated in a subsequent investigation or the agency, institution, organization, program or other entity where such person is employed or with which he is associated, which he reasonably finds will be detrimental to the safety or interests of such person.

S 4. Subparagraph (i) of paragraph (a) and subparagraphs (i) and (ii) of paragraph (b) of subdivision 8 of section 422 of the social services law, as amended by chapter 12 of the laws of 1996, are amended and a new paragraph (f) is added to read as follows:

(i) At any time subsequent to the completion of the investigation but in no event later than ninety days after the subject of the report is notified that the report is indicated the subject may request the commissioner to amend the record of the report. THE COMMISSIONER SHALL MAIL TO THE VICTIM'S PARENT, GUARDIAN OR CUSTODIAN NOTICE OF THE SUBJECT'S REQUEST TO AMEND AND THE BASIS UPON WHICH THE AMENDMENT IS

SOUGHT. SUCH PARENT, GUARDIAN OR CUSTODIAN MAY OBJECT TO THE AMENDMENT WITHIN THIRTY DAYS OF NOTICE BY MAILING HIS OR HER OBJECTION TO THE COMMISSIONER. If the commissioner does not amend the report in accordance with such request within ninety days of receiving the request, the subject shall have the right to a fair hearing, held in accordance with paragraph (b) of this subdivision, to determine whether the record of the report in the central register should be amended on the grounds that it is inaccurate or it is being maintained in a manner inconsistent with this title.

(i) If the department, within ninety days of receiving a request from the subject that the record of a report be amended, does not amend the record in accordance with such request, the department shall schedule a fair hearing and shall provide notice of the scheduled hearing date to the subject, the statewide central register [and, as appropriate, to], the child protective service or the state agency which investigated the report, THE ADULT VICTIM, OR THE MINOR VICTIM'S PARENT, GUARDIAN OR CUSTODIAN. SUCH PARENT, GUARDIAN OR CUSTODIAN MAY APPEAR IN PERSON, OR BY AN ATTORNEY, TO OBJECT TO THE REQUESTED AMENDMENT AND PRESENT WITNESSES, SWORN STATEMENTS AND OTHER EVIDENCE FOR PRESENTATION TO THE HEARING OFFICER.

(ii) The burden of proof in such a hearing shall be on the child protective service or the state agency which investigated the report, THE ADULT VICTIM, OR THE MINOR VICTIM'S PARENT, GUARDIAN OR CUSTODIAN, as the case may be. In such a hearing, the fact that there is a family court finding of abuse or neglect against the subject in regard to an allegation contained in the report shall create an irrebuttable presumption that said allegation is substantiated by some credible evidence.

(F) AN ADULT VICTIM, OR THE MINOR VICTIM'S PARENT, GUARDIAN OR CUSTODIAN MAY SEEK TO VACATE AN AMENDMENT MADE PURSUANT TO PARAGRAPH (E) OF THIS SUBDIVISION WITHIN ONE YEAR OF THE EFFECTIVE DATE OF THIS PARAGRAPH OR KNOWLEDGE THAT SUCH AN AMENDMENT HAS BEEN MADE WITHOUT SUCH PARENT, GUARDIAN OR CUSTODIAN RECEIVING NOTICE OF HEARING OR THE SUBJECT'S REQUEST TO AMEND. THE ADULT VICTIM, OR THE MINOR VICTIM'S PARENT, GUARDIAN OR CUSTODIAN SEEKING TO VACATE AN UNNOTICED AMENDMENT SHALL STATE WITH PARTICULARITY THE DATE THAT THEY BECAME AWARE THAT AN AMENDMENT WAS MADE AND THE EVIDENCE HE OR SHE WILL PRESENT THAT DEMONSTRATES THE COMMISSIONER'S ERROR IN AMENDMENT. THE COMMISSIONER SHALL SCHEDULE A REHEARING DATE, AND SHALL IMMEDIATELY INFORM THE SUBJECT OF THE FORMERLY INDICATED REPORT, THE ADULT VICTIM OR MINOR VICTIM'S PARENT, GUARDIAN OR CUSTODIAN, AND THE CHILD PROTECTIVE SERVICE OR THE STATE AGENCY THAT INVESTIGATED THE REPORT.

S 5. Paragraph (d) of subdivision 1 of section 160.55 of the criminal procedure law, as amended by section 74 of subpart B of part C of chapter 62 of the laws of 2011, is amended to read as follows:

(d) the records referred to in paragraph (c) of this subdivision shall be made available to the person accused or to such person's designated agent, and shall be made available to (i) a prosecutor in any proceeding in which the accused has moved for an order pursuant to section 170.56 or 210.46 of this chapter, or (ii) a law enforcement agency upon ex parte motion in any superior court, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it, or (iii) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the accused has made application for such a license, or (iv) the New York state department of corrections and community supervision when the accused is under parole supervision as a result of conditional release

or parole release granted by the New York state board of parole and the arrest which is the subject of the inquiry is one which occurred while the accused was under such supervision, or (v) the probation department responsible for supervision of the accused when the arrest which is the subject of the inquiry is one which occurred while the accused was under such supervision, or (vi) a police agency, probation department, sheriff's office, district attorney's office, department of correction of any municipality and parole department, for law enforcement purposes, upon arrest in instances in which the individual stands convicted of harassment in the second degree, as defined in section 240.26 of the penal law, committed against a member of the same family or household as the defendant, as defined in subdivision one of section 530.11 of this chapter, and determined pursuant to subdivision eight-a of section 170.10 of this title, OR (VII) UPON RECEIPT OF A JUDICIAL SUBPOENA, THE FAMILY OR SUPREME COURT IN A MATTER WHERE DOMESTIC VIOLENCE, THE PROTECTION OF A CHILD, OR A FALSE ALLEGATION OF DOMESTIC VIOLENCE, CHILD ABUSE OR NEGLECT IS AT ISSUE AND THE DEFENDANT IS A PARTY TO THE ACTION THEREIN; and

S 6. The civil practice law and rules is amended by adding a new section 4549 to read as follows:

S 4549. EVIDENCE OF CHILD'S STATEMENTS REGARDING DOMESTIC VIOLENCE, ABUSE OR NEGLECT. 1. PREVIOUS STATEMENTS MADE BY A CHILD RELATING TO ANY ALLEGATIONS OF DOMESTIC VIOLENCE OR CHILD ABUSE OR NEGLECT SHALL BE GENERALLY ADMISSIBLE IN EVIDENCE, BUT IF UNCORROBORATED, SUCH STATEMENT SHALL NOT BE SUFFICIENT TO MAKE A FACT-FINDING OF ABUSE OR NEGLECT. ANY OTHER EVIDENCE TENDING TO SUPPORT THE RELIABILITY OF THE CHILD'S PREVIOUS STATEMENTS SHALL BE GENERALLY ADMISSIBLE AND SUFFICIENT CORROBORATION. THE TESTIMONY OF THE CHILD SHALL NOT BE NECESSARY TO MAKE A FACT-FINDING OF DOMESTIC VIOLENCE, ABUSE OR NEGLECT.

2. THE PRESIDING JUDGE MAY, HOWEVER, ISSUE AN ORDER PROHIBITING THE DIVULGING OF THE CONTENTS OF SUCH STATEMENTS TO ANY ENTITY OR PERSON OTHER THAN THE COURT, LITIGANTS, THEIR COUNSEL AND ANY WITNESS DEEMED NECESSARY TO THE PROCEEDINGS.

S 7. This act shall take effect immediately.