STATE OF NEW YORK

5398--A

2021-2022 Regular Sessions

IN ASSEMBLY

February 16, 2021

Introduced by M. of A. HEVESI, SILLITTI, BARNWELL, DICKENS, FAHY, CLARK, HUNTER, GALEF, LAVINE, SEAWRIGHT, SIMON, JACKSON, J. RIVERA, McDONOUGH, MORINELLO, THIELE, BURDICK, K. BROWN, STIRPE, QUART, GONZALEZ-ROJAS, DURSO, OTIS, LAWLER, BRABENEC, MANKTELOW, ANGELINO, COOK, GRIFFIN, GUNTHER, STERN, FRONTUS, McDONALD, JEAN-PIERRE, DeSTEFANO, BLANKENBUSH, FERNANDEZ, RA, FITZPATRICK, PHEFFER AMATO, ANDERSON, MIKULIN, L. ROSENTHAL, LALOR, LUPARDO, SIMPSON, EPSTEIN, KELLES, SMITH, JENSEN, BURGOS, JONES, STECK, ZINERMAN, CRUZ, AUBRY, GOTTFRIED, CUNNINGHAM, ABINANTI, HAWLEY -- read once and referred to the Committee on Judiciary -- recommitted to the Committee on Judiciary in accordance with Assembly Rule 3, sec. 2 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the domestic relations law and the family court act, in relation to establishing "Kyra's Law"

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Short title. This act shall be known as and may be cited as "Kyra's Law".

§ 2. Subparagraph 5 of paragraph (a-1) of subdivision 1 of section 240 of the domestic relations law, as amended by chapter 295 of the laws of 2009, is amended to read as follows:

(5) Temporary emergency order. **(i) Notwithstanding any other provision of the law, upon the application of a party to an action concerning custody of or a right to visitation with a child who alleges that the other party to the proceeding has committed, has threatened to commit, or is likely to commit an act of child abuse against such child, or has committed, has threatened to commit, or is likely to commit an act of domestic violence against the party making the allegation or a family or household member of either party, as such family or household member is defined in article eight of the family court act, the court**

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

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shall hold a hearing to determine whether temporary limitations or conditions on the custody or visitation rights of the party who is alleged to have committed an act of child abuse against the child, or committed an act of domestic violence against the party making the allegation or a family or household member of either party is necessary to avoid significant risk to the child's life or safety. The court shall conduct an assessment of the best interests of the child to identify significant risk to the child's life and safety, using a risk assessment tool developed pursuant to clause (ii) of this subparagraph to evaluate factors which shall include, but shall not be limited to:

(A) allegations of domestic violence, child abuse, child sexual abuse or incidents involving harm, or risk of harm, to a child;

(B) prior police reports or domestic violence incident reports documenting prior incidents involving child abuse or domestic violence, or whether either party has been charged with an act which would constitute disorderly conduct, unlawful dissemination or publication of an intimate image, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision one of section 130.60 of the penal law, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, criminal obstruction of breathing or blood circulation, strangulation in the second degree, strangulation in the first degree, assault in the second degree, assault in the third degree, an attempted assault, identity theft in the first degree, identity theft in the second degree, identity theft in the third degree, grand larceny in the fourth degree, grand larceny in the third degree, coercion in the second degree or coercion in the third degree as set forth in subdivisions one, two and three of section 135.60 of the penal law between spouses or former spouses, or between party and child or between members of the same family or household, regardless of the disposition;

(C) whether either party owns, possesses or has access to a firearm, rifle or shotgun;

(D) decisions and reports on registries as required pursuant to subparagraph three of this paragraph;

(E) confinement of a party or child by the other party;

(F) threats to harm or kill self or others, or threats to harm or kill emotional support or comfort animals owned or possessed by self or others, made by one party to the other party or child; and

(G) one party's concern about future assaults from the other party.

Except for good cause shown, the hearing for such determination shall commence within fourteen court days of the application for such hearing and shall not be adjourned. Parties shall be noticed of their right to the assistance of counsel at the initiation of such hearing. When the parties first appear in court, the judge shall advise them before proceeding of the right to be represented by counsel of his or her own choosing, of the right to have an adjournment to confer with counsel, and the right to obtain counsel fees and expenses, pursuant to section two hundred thirty-seven of this article. During such hearing, competent, material and relevant evidence may be admitted, in addition to evidence that may include or consist of hearsay and documents or photographs for which a proper foundation cannot be laid. If a party waives his or her right to a hearing under this section, the court shall advise such party at that time that, notwithstanding such waiver, an applica-

tion under this section may be made at any time during the pendency of the proceedings.

(ii) The office for the prevention of domestic violence, in coordination with the office of court administration and in consultation with the New York state coalition against domestic violence, the New York state coalition against sexual assault, prevent child abuse New York, victims of domestic violence, sexual assault, child abuse or child sexual abuse, civil attorneys representing such victims in custody and visitation proceedings, and researchers and academics with expertise in developing risk assessment tools shall develop a risk assessment tool for use by the court when assessing significant risk to child's life or safety for the purposes of issuing a temporary emergency order. These entities will review and, when appropriate, update the risk assessment tool at least once every two years.

(iii) If the court determines that limitations or restrictions of a party's custody, visitation or contact with the child are necessary to avoid significant risk to the child's life or safety, the court shall issue a temporary emergency order for custody or visitation stating as such. Such order shall set forth conditions of custody or visitation which may be revised by the court upon application by either party only for good cause shown. Any order of the court under this section shall terminate when the court makes a final order of custody or of visitation concerning the child or children, unless the supreme court continues the order to family court.

(iv) There shall be a rebuttable presumption that the court shall not award, in a temporary emergency order for custody or visitation, sole or joint custody or unsupervised visitation to a party who jeopardizes or may jeopardize the life or safety of the child.

(v) The court shall state on the record, and in writing, its findings, the factors considered in rendering its decision and the reasons for the limitations or restrictions placed on a party's custody, visitation or contact with such child.

(vi) All costs, including attorney and expert fees incurred by the non-offending party and the child, to prepare for and participate in such hearing shall be paid by the party who is found to have committed child abuse or domestic violence, unless the offending party has insufficient means to fund such expenses.

(vii) If a party makes a good faith allegation based on a reasonable belief supported by facts that a child is the victim of child abuse, child neglect, or has been exposed to domestic violence, and if that party acts lawfully and in good faith in response to that reasonable belief to protect the child, seek treatment for the child or to protect self, then that party shall not be deprived of custody, visitation or contact with the child, or restricted in custody, visitation or contact, based solely on that belief or the reasonable actions taken based on that belief.

(viii) If the court does not make a finding that limitations or restrictions on a party's custody or visitation with such child are necessary to avoid significant risk to the child's life or safety, the court shall hold an additional hearing whenever a party alleges that a temporary order may be necessary to promote and protect the best interest of the child pending entry of a final order.

(ix) With the exception of hearsay or other non-competent evidence, the court may not refuse to consider, at further proceedings, evidence presented during a hearing for a temporary emergency order or additional evidence of domestic violence or child abuse presented in further

proceedings. The presentation of any facts or evidence at a hearing for a temporary emergency order shall not preclude the presentation of any facts or evidence.

(x) Nothing contained in this subparagraph shall be deemed in any way to limit, restrict, expand or impair the rights of any party to file for a modification of a temporary emergency order as is otherwise provided by law.

(xi) Any party to a proceeding for a temporary emergency order pursuant to this section shall have a right to appeal to the appropriate appellate division. An appeal under this subdivision must be taken no later than five days after the service by a party or the child's attorney upon the appellant of any order from which the appeal is taken or five days from receipt of the order by the appellant in court, whichever is earliest.

(xii) Notwithstanding any other provision of the law, upon emergency situations, including computer malfunctions, to serve the best interest of the child, the court may issue a temporary emergency order for custody or visitation in the event that it is not possible to timely review decisions and reports on registries as required pursuant to subparagraph three of this paragraph.

§ 3. The domestic relations law is amended by adding a new section 240-e to read as follows:

§ 240-e. Custody and visitation; life and safety of the child. 1. For the purposes of this section, the following terms shall have the following meanings:

(a) "Parental alienation" means claims that a child has become estranged from a parent or legal guardian as a result of psychological manipulation by the other parent or legal guardian.

(b) "Victim of domestic violence" shall have the same meaning as defined in section four hundred fifty-nine-a of the social services law.

(c) "Friendly parent" means the propensity of a parent or legal guardian to actively support a child's contact and relationship with the other parent or legal guardian, or the ability of such parent or legal guardian to cooperate in, and resolve disputes, regarding matters affecting such child.

2. Notwithstanding any other provision of law to the contrary, a court making a final determination of custody or visitation based on the best interests of a child pursuant to the provisions of this chapter shall prioritize and promote the life and safety of such child when making such determinations. Promoting the life and safety of a child shall include preventing direct physical and/or emotional harm to such child.

3. Prior to the issuance of a final order of custody or visitation, during its assessment of the best interests of the child, the court shall determine the life and safety of the child who is the subject of such order by considering all relevant factors and by giving weighted consideration to those factors which affect the life and safety of such child, which shall include, but not be limited to:

(a) whether either party is more likely to ensure the life and safety of the child and whether either party jeopardizes the life or safety of the child. There shall be a rebuttable presumption that custody or visitation shall not be awarded to a party who jeopardizes the life or safety of the child;

(b) the impact of disrupting continuity in the child's home, environment and established parenting contacts;

(c) any allegations of domestic violence, child abuse or child sexual abuse, or incidents involving harm, or risk of harm, to a child;

(d) prior police reports or domestic violence incident reports documenting incidents involving child abuse or domestic violence, or whether either party has been charged with an act which would constitute disorderly conduct, unlawful dissemination or publication of an intimate image, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision one of section 130.60 of the penal law, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, criminal obstruction of breathing or blood circulation, strangulation in the second degree, strangulation in the first degree, assault in the second degree, assault in the third degree, an attempted assault, identity theft in the first degree, identity theft in the second degree, identity theft in the third degree, grand larceny in the fourth degree, grand larceny in the third degree, coercion in the second degree or coercion in the third degree as set forth in subdivisions one, two and three of section 135.60 of the penal law between spouses or former spouses, or between parent and child or between members of the same family or household, regardless of the disposition;

(e) whether either party owns, possesses or has access to a firearm, rifle or shotgun;

(f) whether either party is better able and more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child; and

(g) any previously made statements by the child about a party indicating they are fearful of or resistant to having contact or visitation with such party.

4. (a) The court shall not presume that a child's deficient or negative relationship with a party was caused by the other party, nor shall a party be given custody for the purpose of improving a deficient relationship between the child and such party or in an attempt to remediate a child's resistance to contact or visitation with a party.

(b) Allegations regarding parental alienation shall not be admissible in any proceeding for custody or visitation and shall not be considered in assessing a child's best interests.

(c) No psychological or medical theories or labels related to a child's resistance to contact with a party shall be admitted into evidence unless they are based on empirical proof of scientific reliability and validity and generally accepted by the scientific and professional community.

(d) No reunification treatment or any similar program designed to repair a party's relationship with a child due to parental alienation shall be ordered by the court without scientifically valid and generally accepted proof of the effectiveness and therapeutic value of such treatment or program; nor shall a treatment or program be ordered which is predicated on separating a child from their primary caregiver.

(e) In cases involving domestic violence or child abuse, whether such abuse has occurred or is occurring, a court shall not consider whether either parent is a friendly parent.

5. In cases where the court has found a parent to be a victim of domestic violence and/or where child abuse has occurred or is occurring:

(a) the court shall award joint legal custody only on consent of the parties or where it has been determined that the parties can effectively communicate, cooperate with each other, and make joint decisions

concerning the child; provided, however, that where final orders are on the consent of the parties, in no event shall an order of joint legal custody be awarded when there is an existing or prior full stay away order of protection against a party on behalf of another party to the proceeding or when there is an existing temporary order of protection entered ex parte; and

(b) all costs, including attorney and expert fees, incurred by the non-offending parent and the child, shall be paid by the parent who is found to have committed child abuse or domestic violence, unless the offending parent has insufficient means to pay such costs.

6. (a) Before judges, referees, or other hearing officers preside over child custody proceedings in which one or more parties have alleged domestic violence or child abuse, they shall complete at least twenty hours of initial training for the handling of such cases. The office for prevention of domestic violence shall, within amounts appropriated for such purpose, contract exclusively with the New York state coalition against domestic violence, and other nonprofit entities with whom it subcontracts with expertise in child abuse or gender-based violence, to develop such training. Such entity, or entities in partnership, shall review and update the training at least once every two years. In consultation with the office of court administration, such entities, or entities in partnership, shall be responsible for providing such training to judges, referees, and other hearing officers handling child custody proceedings. Such training shall include, but not be limited to:

(1) a review of relevant statutes and case law pertaining to domestic violence and child abuse;

(2) the dynamics and effects of domestic violence and child abuse, including but not limited to, emotional, financial, physical, technological and sexual abuse, and an understanding of the barriers and fears associated with reporting domestic violence and child abuse and why victims may not have documented evidence of abuse;

(3) tactics commonly used by one party to induce fear in, or dominate or control a partner or child, including verbal, emotional, psychological, and/or economic abuse; isolation; efforts to build trust and an emotional connection with a child to support future manipulation; exploitation; abuse; threats; controlling and harassing behaviors, including monitoring of a partner's location and activities; use of oppressive behavior designed to deprive a partner of their rights and liberties and establishing a regime of domination in the partner's personal life; litigation abuse; and demands for custody in order to pressure the partner to return or punish the partner for leaving;

(4) knowledge of trauma, particularly as it relates to sexual abuse and the risks posed to children and the long-term dangers and impacts posed by the presence of adverse childhood experiences;

(5) the increased risk of escalating violence that occurs during child custody proceedings and methods for assessing a child's safety during custody and visitation proceedings, particularly in cases involving domestic violence or child abuse;

(6) the assessment of legality or signs of lethal violence, and instruction on the use of a risk assessment tool to assess risk to a child's life or safety for the purpose of issuing a temporary emergency order;

(7) education regarding the harm courts may cause children in child custody cases where domestic violence or child abuse is present by relying on non-scientific theories such as parental alienation, parental

alienation syndrome, the friendly parent concept, or any other theory or label that is not supported by scientific research and not generally accepted by the scientific community;

(8) the investigation process once a law enforcement agency or a local department of social services has received a report of suspected child abuse, including the limitations of investigating reports of suspected child abuse; and

(9) appropriate experience and qualifications of child custody evaluators and mental health treatment providers.

(b) Once initial training requirements have been met, judges, referees, and other hearing officers presiding over child custody proceedings in which one or more parties have alleged domestic violence or child sexual abuse shall complete at least ten hours of training every two years in order to remain eligible to handle such proceedings.

§ 4. Subdivision (a) of section 70 of the domestic relations law, as amended by chapter 457 of the laws of 1988, is amended to read as follows:

(a) (i) Where a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly. Where either party to an action concerning custody of or a right to visitation with a child alleges that the other party has committed an act of child abuse against such child, or committed an act of domestic violence against the party making the allegation or a family or household member of either party, as such family or household is defined in article eight of the family court act, the court must first, before considering any other best interest factors, hold a hearing to determine whether temporary limitations or conditions on the custody or visitation rights of the party who is alleged to have committed an act of child abuse against the child, or committed an act of domestic violence against the party making the allegation or a family or household member of either party is necessary to avoid significant risk to the child's life or safety, as described pursuant to subdivision five of section two hundred forty of this chapter.

(ii) Notwithstanding any other provision of law to the contrary, a court making a determination that limitations or restrictions of a party's custody, visitation or contact with the child are necessary to avoid significant risk to the child's life or safety shall issue a temporary emergency order for custody or visitation stating as such.

(iii) Notwithstanding any other provision of law to the contrary, prior to the issuance of a temporary emergency order of custody or visitation, the court shall conduct an assessment of the best interests of the child to identify significant risk to the life or safety of the child who is the subject of such order by considering the factors described in section two hundred forty of this chapter.

(iv) Notwithstanding any other provision of law to the contrary, a court making a final determination of custody or visitation based on the best interests of a child pursuant to the provisions of this chapter

shall prioritize and promote the life and safety of such child when making such determinations. Promoting the safety of a child shall include preventing direct physical and/or emotional harm to such child. Prior to the issuance of a final order of custody or visitation, during its assessment of the best interests of the child, the court shall determine the safety of the child who is the subject of such order by considering all relevant factors and by giving weighted consideration to those factors which affect the life and safety of such child, pursuant to subdivision three of section two hundred forty-d of this chapter.

(v) In making a decision pursuant to paragraph (i) of this subdivision, the court shall be bound by the presumptions and admissibility described pursuant to section two hundred forty-d of this chapter. Further, the court shall not take into consideration whether either party is married, was formerly married or has ever been married to the other party or anyone else.

(vi) In cases where the court has found a party to be a victim of domestic violence and/or where child abuse has occurred or is occurring, the court shall award joint legal custody only on consent of the parties or where it has been determined that the parties can effectively communicate, cooperate with each other, and make joint decisions concerning the child; provided, however, that where final orders are on the consent of the parties, in no event shall an order of joint legal custody be awarded when there is an existing or prior full stay away order of protection against a party on behalf of another party to the proceeding or when there is an existing temporary order of protection entered ex parte and all costs, including attorney and expert fees, incurred by the non-offending parent and the child, shall be paid by the parent who is found to have committed child abuse or domestic violence, unless the offending parent has insufficient means to pay such costs.

(vii) Before judges, referees and other hearing officers preside over child custody proceedings in which one or more parties have alleged domestic violence or child abuse, they shall complete initial training for the handling of such cases as described pursuant to section two hundred forty-d of this chapter. Once initial training requirements have been met, judges, referees and other hearing officers shall complete additional training every two years as described pursuant to section two hundred forty-d of this chapter.

§ 5. The family court act is amended by adding a new section 654 to read as follows:

§ 654. Temporary order of custody or of visitation. (a) Notwithstanding any other provision of the law, upon the application of either party to an action concerning custody of or a right to visitation with a child who alleges that the other party has committed an act of child abuse against such child, or committed an act of domestic violence against the party making the allegation or a family or household member of either party, as such family or household member is defined in article eight of the family court act, the court shall hold a hearing to determine whether temporary limitations or conditions on the custody or visitation rights of the party who is alleged to have committed an act of child abuse against the child, or committed an act of domestic violence against the party making the allegation or a family or household member of either party is necessary to avoid significant risk to the child's life or safety, in accordance with subparagraph five of paragraph (a-1) of subdivision one of section two hundred forty of the domestic relations law. If the court determines that limitations or restrictions of a party's custody, visitation or contact with the child are necessary

to avoid significant risk to the child's life or safety, the court shall issue a temporary emergency order for custody or visitation stating as such, in accordance with clause (iii) of subparagraph five of paragraph (a-1) of subdivision one of section two hundred forty of the domestic relations law.

(b) Such temporary order of custody or of visitation may be taken as of right to the appellate division of the supreme court. Pending the determination of such appeal, such order shall be stayed where the effect of such order would be to discharge the child, if the family court or the court before which such appeal is pending finds that such a stay is necessary to avoid significant risk to the child's life or safety. A preference in accordance with rule five thousand five hundred twenty-one of the civil practice law and rules shall be afforded, without the necessity of a motion, for appeals under article three; parts one and two of article six; articles seven, ten, and ten-A of this act; and sections three hundred fifty-eight-a, three hundred eighty-three-c, three hundred eighty-four, and three hundred eighty-four-b of the social services law. An appeal under this subdivision must be taken no later than five days after the service by a party or the child's attorney upon the appellant of any order from which the appeal is taken, five days from receipt of the order by the appellant in court.

§ 6. Subdivision a of section 1112 of the family court act, as amended by section 28 of part A of chapter 3 of the laws of 2005, is amended to read as follows:

a. An appeal may be taken as of right from any order of disposition and, in the discretion of the appropriate appellate division, from any other order under this act. An appeal from an intermediate or final order in a case involving abuse or neglect, the decision to grant or deny a temporary emergency order, as determined pursuant to section six hundred fifty-four of this act, or a temporary emergency order issued to avoid significant risk to the child's life or safety, as determined pursuant to section six hundred fifty-four of this act, may be taken as of right to the appellate division of the supreme court. Pending the determination of such appeal, such order shall be stayed where the effect of such order would be to discharge the child, if the family court or the court before which such appeal is pending finds that such a stay is necessary to avoid imminent risk to the child's life or health. A preference in accordance with rule five thousand five hundred twenty-one of the civil practice law and rules shall be afforded, without the necessity of a motion, for appeals under article three; parts one and two of article six; articles seven, ten, and ten-A of this act; and sections three hundred fifty-eight-a, three hundred eighty-three-c, three hundred eighty-four, and three hundred eighty-four-b of the social services law.

§ 7. This act shall take effect on the ninetieth day after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made on or before such effective date.